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REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BY

THE VICE-CHANCELLOR SIR JOHN STUART.

BY

J. W. DE LONGUEVILLE GIFFARD,
(OF THE INNER TEMPLE,)
ESQUIRE, BARRISTER-AT-LAW.

VOL. III.

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Lord Westbury, . . .	*Lord Chancellor.*
Sir John Romilly, . . .	*Master of the Rolls.*
Sir James Lewis Knight Bruce, Sir George James Turner,	*Lords Justices.*
Sir Richard Torin Kindersley, Sir John Stuart, . . . Sir William Page Wood, .	*Vice-Chancellors.*
Sir William Atherton, . .	*Attorney-General.*
Sir Roundell Palmer, . .	*Solicitor-General.*

ERRATA ET ADDENDA.

In *Cunningham* v. *Butler*, page 42, to the beginning of the third line from the top, add the following, "Mr. *Bacon*, Mr. *Craig*, and." On the same page to the last line of note (*e*) add the following, "1st July, 1861."

In *Pawley* v. *Turnbull*, page 81, after Mr. *Malins's* name, in line 16 from the top, add "Mr. *Craig*."

In the last line of page 81, after the words, Mr. *Baggally*, add "in the absence of Mr. *Bacon*."

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

1861.

TROTMAN *v.* FLESHER.
FLESHER *v.* TROTMAN.

1861.

Jan. 23*rd*, 25*th*, 26*th*, & 30*th*.
Feb. 11*th*.

The solicitor to the tenants for life, with power of leasing settled real estate, who had obtained from his clients a parol agreement for a lease, on faith of which he expended large sums—*Held*, not entitled to a lease.

Specific performance of a parol agreement by tenant for life, with power of leasing, not decreed on the ground of possession and expenditure, if prejudicial to remaindermen. *Shannon* v. *Bradstreet* (*a*), and *Blore* v. *Sutton* (*b*), illustrated.

THIS bill was filed by the tenants for life and trustees of certain settled real estate, under a private Act of Parliament (to which their children, the remaindermen, were made defendants), against William Flesher, and prayed that it might be declared that there was no agreement subsisting between the plaintiffs or any of them and the defendant for any lease of two farms in the bill mentioned; but that if the Court should be of opinion that the letters of the 9th of April, 1858, and the 16th of April, 1858, were sufficient to constitute an agreement for a lease, then that, having regard to the relation at that time subsisting between the plaintiffs and the defendant, such agreement might be declared void, and might be decreed to be set aside. The bill also prayed for delivery up of possession, and for an account.

(*a*) 1 Sch. & Lef. 52. (*b*) 3 Mer. 237.

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The defendant William Flesher filed a cross bill, praying for a specific performance of the agreement.

By a private Act of Parliament, reciting, among other things, that the parties interested beneficially (but subject to certain charges and incumbrances) in the Dallington estates were the plaintiff the Rev. Fiennes Samuel Trotman, and the plaintiffs W. J. Wickham and Lucy, his wife, in right of the said Lucy Wickham, as tenants in common for life, without impeachment of waste, and their respective children *nominatim* in remainder, it was enacted that the said W. E. Tyndale and E. Wickham should be the first trustees for the purposes of that Act, and the fee-simple of the said estate was thereby vested in the said W. E. Tyndale and E. Wickham (subject as aforesaid); and it was enacted that the plaintiffs F. S. Trotman and W. J. Wickham and Lucy his wife, "and the survivors and survivor of them, and after the decease of such survivor the trustees, might from time to time make any lease of any part of the lands for any term not exceeding twenty-one years, to take effect in possession immediately, or within three months after the making thereof, and at the best rent that could be reasonably obtained for the same, so that there should be thereby reserved powers of distress and entry."

The defendant Flesher acted as the solicitor of the tenants for life, with the sanction of all parties, in obtaining the Act of Parliament, and as manager and receiver of the estates.

In September, 1857, the Lower Lodge Farm being unlet, Flesher, with the authority of the tenants for life, occupied the farm as tenant at will (a sale of the farm being in contemplation).

At Michaelmas, 1857, the Upper Lodge Farm became vacant, and the defendant, with the sanction of the tenants for life, took temporary occupation of such farm as manager.

The rent of the Lower Lodge Farm, prior to the

defendant's occupation, had been 260*l.*, and of the Upper Lodge Farm 376*l.*

There had been a project of letting both farms to one John Rice; but, as the original bill alleged, "the defendant Flesher being fully aware of the disinclination of the last-mentioned plaintiffs to let the said farms to the said John Rice, continued, in the course of conversations in various interviews which took place between himself and the last-mentioned plaintiffs respectively, to intimate to them that if they persisted in their objection to the said John Rice, he (the said defendant) was himself ready and willing to take a lease of the said Lodge Farms, as no other eligible tenant for them could be met with."

In the month of April, 1858, W. J. Wickham went to the residence of the plaintiff F. S. Trotman, at Dallington Vicarage, and both Mr. Wickham and Mr. Trotman made the following memorandum, in writing, to be submitted to the defendant:—"Concerning the letting of the Lodge Farms, we are of opinion that the Lodge Farms should be in Mr. Flesher's hands rather than others. We are unwilling to grant a lease of the Home Farms, occupied by Mr. Rice and Mr. George West. We are willing to grant a lease of the Lodge Farms to Mr. Flesher of fourteen years, but it should contain such provisions as not to interrupt the sale of the upper 600 acres, and to be of a kind to enable us to justify ourselves to our young people. The terms Mr. Flesher should put down, and then submit them to an indifferent person. The lease to be drawn by some one else, according to Mr. Flesher's suggestion."

On the 8th of April, 1858, Mr. Trotman and Mr. Wickham had an interview with the defendant Flesher at Dallington Vicarage, and the memorandum was then read over to the defendant, "who," as the bill alleged, "thereupon expressly stated his wish to become tenant of the said farms, and requested the last-mentioned plaintiffs

1861.

TROTMAN v. FLESHER. FLESHER v. TROTMAN.

Statement.

to write and send to him by post a joint letter, which he might show to the said John Rice, with a view to justifying his own conduct in taking a lease of the said farms himself, after professing to have been endeavouring to obtain a lease of them for the said John Rice; but the defendant did not state what rent he was prepared to give, or what provisions he proposed should be inserted in the lease."

In compliance with the said request, the following letter was signed and sent by the last-mentioned plaintiffs to the defendant:—

"Dallington, April 9, 1858.

"Notwithstanding your strong recommendation to us that Mr. Rice should occupy the two Heath Farms" (meaning thereby the Lodge Farms) "on a lease for fourteen years, in conjunction with that he at present occupies on the same lease, we are, after much deliberation, of opinion that the uncertain value of the Dallington land hereabouts in future years precludes us from accepting Mr. Rice as tenant for the Heath Farms on the conditions he proposes. The same difficulty does not present itself to us with regard to yourself. You are not in the occupation of these lands. We therefore most willingly accept you as our tenant for the Lodge Farms.

"Yours sincerely,

"W. J. WICKHAM.

"FIENNES S. TROTMAN.

"W. Flesher, Esq."

On the 16th of April, Mr. Trotman wrote to the defendant Flesher a letter, in which the following was contained:—

"P.S. On the other side are a few points which I and Mr. Wickham agreed on to propose to you the other day when he was here.

"The Lodge Farms," &c.

"Messrs. Trotman and Wickham are of opinion that

the Lodge Farms should be in Mr. Flesher's hands in preference to others. They are unwilling to grant a lease of the Home Farms occupied by Messrs. George West and J. Rice. They will grant a fourteen years' lease to Mr. Flesher, but it should contain such provisions as not to interrupt the sale of the upper 600 acres, and to be of a kind to justify us to our young people. The provisions Mr. Flesher should put down for T. and W.'s approval, and then be submitted to an indifferent person; the lease to be drawn (as proposed by Mr. Flesher) by some one else."

The bill alleged, that the defendant Flesher never sent to the plaintiffs for their approval any statement of the provisions to be inserted in the proposed lease, and no lease was ever granted to him; but he, being then in occupation of the Lodge Farms, as manager of the estate, ever since continued to occupy the same, and now claimed to be entitled to hold the same as tenant, for fourteen years, at a rent of 636*l.* per annum.

That in May, 1858, the defendant Flesher, who had never before rendered an account, though frequently requested to do so, after much pressure, rendered an account to the plaintiffs of his receipts and payments in respect of the estate, in which he debited himself with rent for the Lower Lodge Farm from Michaelmas, 1857, at the rate of 260*l.* per annum, and with half-a-year's rent from the same date, for the Upper Lodge Farm, at the rate of 376*l.* per annum, and with a further sum of 357*l.* as the valuation of hay and straw, &c., left by Mr. Ambrose West upon the Upper Lodge Farm; in the same account he took credit for the sum of 599*l.* as paid on account of the plaintiffs to Mr. West as outgoing tenant, on leaving the said farm, and with 208*l.* per annum for his own services as manager.

In November, 1858, the plaintiffs ceased to employ Mr. Flesher as their solicitor or manager and receiver of

1861.

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Statement.

the estates, and required him to give up possession of the farms, offering to allow him for his expenditure. The defendant refused to give up possession, alleging he was entitled to a lease for fourteen years. On the 21st of April, 1859, the plaintiffs gave him formal notice to quit, and shortly afterwards filed the original bill. An action for trespass having been brought against Flesher, he filed the cross-bill, for specific performance, and praying that the defendants might be decreed to execute a lease for fourteen years at a rent of 653*l.*, for an account, and for an injunction, which he obtained, to restrain the action of trespass.

An immense mass of evidence was adduced on both sides, the material parts of which are noticed in his Honour's judgment.

Argument.

Mr. *Green* and Mr. *Schomberg* opened the cross-bill, and contended, first, that the correspondence disclosed a binding agreement. It showed an acceptance of a proposal that Mr. Flesher (who had been in the first instance anxious that Mr. Rice should have the farm), should be the tenant.

But, even if there were no written agreement, Mr. Flesher was let into possession, and had laid out large sums in improvements, which could only be referable to an agreement for a lease for a term. Possession with expenditure, both of which existed here, took the case out of the Statute of Frauds.

Even if the agreement did not bind the remainderman, it was good after part performance against the tenants for life: *Morphett* v. *Jones* (*a*), *Mundy* v. *Joliffe* (*b*), *Sutherland* v. *Briggs* (*c*), *Meynell* v. *Surtees* (*d*), *The Duke of Devonshire* v. *Eglin* (*e*), *Pain* v. *Coombs* (*f*), *Lord Selsey* v. *Rhoades* (*g*).

(*a*) 1 Swanst. 172.
(*b*) 5 M. & C. 167.
(*c*) 1 Hare, 26.
(*d*) 3 Sm. & G. 101.
(*e*) 14 Beav. 530.
(*f*) 3 Sm. & G. 449; s. c. 1 De G. & J. 34.
(*g*) 2 S. & St. 41; s. c. on appeal, 1 Bligh, N. S. 1.

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Argument.

Mr. *Craig* and Mr. *Faber*, for the plaintiffs, contended, first, that there was no concluded agreement; secondly, if there had been, it was an agreement obtained by a solicitor from his clients during the existence of that relation; and, thirdly, that any lease must be under the power reserved, and must, therefore, be for the best rent that could be obtained: *Doe* v. *Ratcliffe* (*a*), and case of the *Queensberry Leases* (*b*).

At all events the agreement, if proved, could not bind those in remainder.

[*Cane* v. *Lord Allen* (*c*), was also cited.]

[His Honour referred to *Powell* v. *Thomas* (*d*), *Blore* v. *Sutton* (*e*), and *Shannon* v. *Bradsheet* (*f*).]

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Feb. 11th.

In these causes the first question is, whether there is sufficient evidence of any contract by Trotman and Wickham, the defendants in the cross-suit, to grant a lease to the plaintiff Flesher.

He has attempted to prove a parol agreement. A material part of the evidence of the parol agreement consists of written documents; but neither in these documents nor in the parol testimony, can I find anything sufficiently certain, definite, and conclusive to constitute a binding agreement.

The 9th of April, 1858, seems to be the day fixed upon by Mr. Flesher, as the date of the agreement. He says that, on the receipt of the letter on the 9th of April, 1858, signed by the defendants Trotman and Wickman, he considered that he was to be the tenant of the two farms in question. But this letter only states reasons for preferring him to one Mr. Rice, whom he had proposed as a proper tenant on a lease of fourteen years. After stating the difficulty as to letting the farms to that person, the letter contains the following passage, which is strongly

(*a*) 10 East, 278.
(*b*) 1 Bligh, 339.
(*c*) 2 Dow. 289.
(*d*) 6 Hare, 300.
(*e*) 3 Mer. 237.
(*f*) 1 Sch. & Lef. 32.

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relied upon by Mr. Flesher:—"The same difficulty does not present itself to us with regard to yourself. You are not in the occupation of these lands. We, therefore, most willingly accept you as our tenant of the Lodge Farms."

According to the evidence of both the defendants, this letter was written at the suggestion of Mr. Flesher, to enable him to justify himself to Mr. Rice, and not for any purpose of concluding an agreement. This is confirmed by Flesher's own statement upon oath in the 17th paragraph of his answer, in which he says that at the meeting on the preceding day (when it is not pretended that any agreement was made), he said he should like to have something to show Mr. Rice; because he should not like him to think that he had been the means of their not letting him have the farms.

But even if this letter of the 9th of April had been written with any other view, it contains no reference to any antecedent offer or proposal of terms of a lease. It mentions no rent, or other necessary stipulations for a lease. Some attempt is made by Mr. Flesher to refer the words of acceptance in this letter to the offer made by him in his letter of the 5th of March; but in that letter no rent is offered or mentioned. All parties agree that the meeting of the 8th of April was only for discussion, and ended with a view to further and full consideration. During the discussion at that meeting Mr. Flesher says he told the defendants "that, if he took the farm, it must be a binding agreement, as he could not invest so much money in them unless he was secure."

An experienced solicitor, dealing with his own clients, and aware of the necessity of a binding agreement, could have no sound reason for thinking that, on the receipt of the letter of the 9th of April, he had got a concluded agreement. If through an improvident confidence he so considered it, he was made quite aware of his mistake by the defendant's letter of the 16th of April, in which, so far from there being any recognition of a concluded

agreement, there is a mere proposal of some of the terms, and a request to Mr. Flesher to put down in writing the provisions for approval, and then to be submitted to an indifferent person.

If Mr. Flesher, when he received this letter, really considered that the agreement had been concluded on the 9th of April, he was bound to say so, If he did not, and if he wished for that binding agreement which, on the 8th of April, he said he was determined to have, he knew that his duty required him to put down the terms in writing, and to submit them (as he was desired to do) to an indifferent person. He did none of these things.

Even if there had been clear evidence of a parol agreement, the next question is how it could be enforced by any decree of this Court. Trotman and Wickham were mere tenants for life, with a power of leasing. It has never been held that a parol agreement for a lease by a tenant for life, with power to grant leases, could bind the remainderman. Sir William Grant, in the case of *Blore* v. *Sutton*, has given a clear exposition of the law on this subject. The reason why a parol agreement in part performed is taken out of the operation of the Statute of Frauds has no application where the lease is to bind the persons entitled in remainder. A man who permits expenditure on the faith of his parol agreement, is considered guilty of fraud in taking advantage of its not being in writing. But the remainderman, who has entered into no agreement, written or parol, and done no act on the faith of which the other party could have relied, is guilty of no fraud, and cannot be bound. Strictly speaking, the remainderman and the trustees could only be bound by a lease actually executed according to the power. But Lord Redesdale, in the case of *Shannon* v. *Bradstreet*, showed on good grounds that a clear, explicit, written agreement ought in equity to be held as binding as a formal lease framed on the same terms.

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This doctrine has never been extended to a parol agreement. Lord Redesdale, indeed, seems to express an opinion that, although the remainderman could not be bound by a parol agreement, the tenant for life might be bound, where there were circumstances sufficient to take the case out of the Statute of Frauds. But there is no case in which this Court has ever made a decree for a lease merely to bind the tenants for life, where the parol agreement affected to bind those in remainder.

In the present case, the decree for specific performance is asked at the bar only against the tenants for life. It would be impossible to make such a decree in this case without affecting the interests of the remainderman.

There is an immediate power of sale in the trustees, which may be exercised during the lives of the tenants for life. When it is exercised, it has an immediate effect on the estates and interests of those entitled in remainder; and the amount of rent and other stipulations in the lease are material ingredients affecting the price, which is to constitute the capital ultimately divisible among the remaindermen.

It is proper to advert to the change which the enlarged jurisdiction of this Court, in cases of specific performance, may make in the form of relief where expenditure on the faith of a parol agreement is the ground for relief. The Court has now power to award damages or compensation in such cases.

It may often happen that a decree for compensation may, under our enlarged jurisdiction, be a more just and proper form of relief than specific performance. In the present case, the trustees and the tenants for life, by their original bill, submit to make compensation, and there must therefore be a decree to that effect. But the bill for the specific performance must be dismissed with costs, and the costs must include the costs of the evidence in both causes. Those costs have been unreasonably increased by the evidence on behalf of Mr. Flesher, includ-

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ing an enormous mass of correspondence long anterior to the treaty for a lease.

In the original suit, which is by the tenants for life and the trustees against Mr. Flesher to recover possession of the farms on the terms of paying him an adequate compensation, each of the parties must pay his own costs. One decree, to the effect I have stated, in both causes.

The decree was as follows:—

Ordered, that the injunction awarded against plaintiffs, restraining action against Flesher, be dissolved; that bill in *Flesher* v. *Trotman* be dismissed with costs, including costs of evidence in both suits. Costs to be taxed, &c. No further costs in *Trotman* v. *Flesher*. Ordered that the defendant Flesher deliver up possession of the farms to plaintiffs. Declare defendant Flesher entitled to compensation in respect of monies expended on the farms, &c. Ordered, that following accounts and inquiries be taken in suit of *Trotman* v. *Flesher*:—

1. Account of receipts and payments of Flesher as agent and manager of the Dallington estate during his agency, including bills of costs as solicitor, to be taxed, &c.

2. Account of money expended by defendant Flesher in unexhausted improvements on the said farms during his occupation, not included in previous accounts.

3. An inquiry what ought to be allowed to Flesher as outgoing tenant by way of compensation for such expenditure or otherwise up to the time of his delivering up possession, after charging him with rent of premises at 653*l.* per annum from Michaelmas, 1857. Ordered, that plaintiffs pay to defendant Flesher what shall be found due within one month after approval of chief clerk's certificate. Adjourn further consideration. Liberty to apply.

Reg. Lib. B, 1861, page 406.

THE ORIENTAL BANKING COMPANY *v.* COLEMAN.

March 4th & 5th.

Where a trader in insolvent circumstances by a bill of sale assigned to one creditor all his household furniture and effects, and the goods and chattels in and upon his place of business, and was afterwards adjudged bankrupt—*Held* that the assignment was an act of bankruptcy, and fraudulent and void against the assignees.

PREVIOUSLY to the 14th of March, 1857, Colonel W. P. Waugh, being indebted to the London and Eastern

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Banking Company in the sum of 224,000*l.*, by an indenture, in the nature of a bill of sale, between himself, of the one part, and the bank, of the other part, after reciting the debt, it was witnessed that, in consideration of 80,000*l.*, part of the said sum of 244,000*l.* then due and owing by the said W. P. Waugh to the said bank, he, the said W. P. Waugh, did grant and assign to the said corporation "all and singular the household furniture and effects, plate, pictures, prints, utensils, goods, chattels, and all other things whatsoever in or about Branksea Castle aforesaid, or in or about any place or places in the Island of Branksea, belonging to the said W. P. Waugh," &c., to hold the same, with their appurtenances, unto the said corporation, for their own proper use and benefit; upon trust, nevertheless, and with full power and authority for the said corporation to enter into the said castle and island, &c., and take possession of the said furniture and effects, &c., and to make, sell, and absolutely dispose of the same, &c.; and upon receipt of the purchase-monies, to retain and pay the said sum of 80,000*l.* and interest at 5 per cent.

On the 26th of March, 1857, the indenture was registered as a bill of sale. On the 9th of April it was assigned by the London and Eastern Banking Company to the Oriental Banking Company, as a security.

On the 14th of April, 1857, Col. Waugh was adjudged a bankrupt; William Bell was appointed an official assignee; and W. S. P. Hughes, W. C. Jay, and W. Pearce, were appointed creditors' assignees.

Shortly after the bankruptcy, the mortgagee of the real property for the sum of 3500*l.* took possession of Branksea Castle, and the chattels thereon, and allowed Col. Waugh to remain there as his tenant. It was, however, subsequently arranged between the solicitors of the mortgagee, the assignees in bankruptcy, and the London and Eastern Banking Company (but without the knowledge of the

Oriental Bank, as they alleged), that the property taken possession of should be sold by the auctioneers, and that 3500*l.* should be deposited in the Westminster Bank, in the names of the respective solicitors, to secure the mortgagees and the residue in the joint names of J. E. Coleman and W. Bell, as representing the London and Eastern Banking Company, and that the monies should remain so deposited until the rights of the respective owners should be ascertained.

On the 25th of November, 1857, Vice-Chancellor Wood made an order to wind up the London and Eastern Banking Company, and C. J. F. Stuart and J. Ball were appointed official managers. On the 22nd of April, 1858, the London and Eastern Banking Company were adjudicated bankrupt, and W. Bell and J. Thompson were appointed assignees.

The Oriental Bank denied that they were aware, or privy to the above arrangement.

In pursuance of the arrangement, the property was sold by auction for nearly 7000*l.*, of which 3500*l.* was deposited in the London and Westminster Bank, in the names of the solicitors; 3000*l.* was paid into the City Bank, in the names of Coleman and Bell, leaving in the auctioneer's hands 447*l.* 2*s.* 7*d.*

The Oriental Banking Company filed their bill, praying that an account might be taken of what was due on the security of the 9th of April, 1857, and that the several defendants might be decreed to apply the sums of 3000*l.* and 477*l.* 2*s.* 11*d.* in part satisfaction of what should be found due.

The evidence in support of the bill was to the effect, that the security had been given to the plaintiffs *bonâ fide* by Col. Waugh under the pressure of legal proceedings being taken against him, and that the plaintiff's agents had taken possession of the trade effects under the bill of sale.

The evidence adduced on behalf of the defendant

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showed that Col. Waugh was and had been in insolvent circumstances.

Argument.

Mr. *Malins*, Mr. *Erskine*, and Mr. *Tyndall*, on behalf of the plaintiffs, contended, *inter alia*, that it was no objection that the articles assigned were used in the business carried on at Branksea Island, because Col. Waugh also carried on business, and was described in the proceedings in bankruptcy as doing so, at Abingdon Street, Westminster.

On the other points they cited, *London and Eastern Banking Company, Longworth's case (a)*, *Hall* v. *Franklin (b)*, *Van Casteel* v. *Booker (c)*.

Mr. *Bacon* and Mr. *E. F. Smith*, for the assignees, contended that, where a trader in insolvent circumstances assigned the stock in trade which enabled him to carry on his business, that amounted to an act of bankruptcy: *Ex parte Bailey (d)*, *Lindon* v. *Sharp (e)*, *Porter* v. *Walker (f)*, *Wedge* v. *Newlyng (g)*.

Mr. *Rodwell* appeared for the assignee of the London and Eastern Bank.

Mr. *Hetherington* appeared for the official manager of the London and Eastern Bank.

Mr. *Bevir* appeared for the stakeholders.

Mr. *Malins* was heard in reply.

Judgment.

THE VICE-CHANCELLOR:—

The question in this case is as to the validity of a bill of sale, executed by William Petrie Waugh, who, after

(*a*) Johns. 465.
(*b*) 3 M. & W. 259.
(*c*) 2 Ex. 691, 706.
(*d*) 3 De G. M. & G. 534.
(*e*) 6 M. & G. 895; 7 Scott, N. R. 130.
(*f*) 1 M. & G. 686.
(*g*) 4 B. & Ad. 831.

its execution was adjudicated a bankrupt. He is described in the proceedings in bankruptcy as William Petrie Waugh, of Branksea Island and of Abingdon Street, Westminster, and as trading there under the style and description of the Branksea Castle Pottery Company. The trade which the bankrupt carried on was this pottery business in the island of Branksea; and though a company is mentioned, that company seems to have been composed of himself alone. The bill of sale affected to assign to the London and Eastern Banking Corporation not merely the furniture in Branksea Castle, but all the "goods, chattels, and all other things whatsoever in or about Branksea Castle, or in or about any place or places in the island of Branksea, belonging to the said William Petrie Waugh." The evidence of the plaintiffs shows that Walsh, the agent of the plaintiffs, took possession of all the trading effects by virtue of this bill of sale; and, in fact, the bill of sale enabled him to take possession of all the trading effects in Branksea Island in the possession of Waugh. When they were taken possession of they constituted all that had been the stock in trade, which had enabled Waugh to carry on that trading in respect of which he was made a bankrupt. Now, a long course of uniform decisions has established this, that, if a trader is made a bankrupt, and before the bankruptcy, being in insolvent circumstances, he assigns all that stock in trade which enabled him to carry on his business, such an assignment is fraudulent in the eye of the law, and an act of bankruptcy in itself. In this case the insolvency is clearly proved, and the evidence shows that everything which enabled Waugh to carry on his business was assigned by this bill of sale. In the case of *Smith* v. *Cannan*, (*a*) where a farmer assigned all his farming stock, and reserved considerable property, such as an equity of redemption and bank shares, it was held

(*a*) 2 E. & B. 35.

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that an assignment of all his farming stock was enough to create that degree of fraud which vitiated the transaction. But the Court went so far as to say, that it was an immaterial fact in that case, that the property included in the assignment exceeded the liabilities for which it was pledged. Chief Justice Jervis said, "I think the real test is, Has the trader by the deed put his property out of his control so as to deprive himself of the present power to satisfy his creditors as but for the deed he might do?" Therefore, upon the authorities, it must be held in this case, that the bill of sale was invalid, and that the bill must be dismissed. The plaintiffs must pay the costs of all parties except the stakeholders.

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Nov. 23rd & 24th.
Dec. 17th & 18th.

SPACKMAN *v.* LATTIMORE.

A registered shareholder in a railway company, which was afterwards incorporated with a new company by an Act of Parliament, enacting that every registered shareholder in the old company should be deemed to hold a share in the new company to be called a deferred share, and entitled, on demand, to receive a certificate for such deferred share—*Held*, entitled to sue in respect of the funds of the new company, although he had not exchanged his shares or received a certificate as a shareholder in the new company.

Where the promoters of the new undertaking signed the subscription contract for sums which they represented to Parliament as out of their own funds, but which, in fact, they borrowed, and afterwards sought to charge against the funds of the new company, the Court, at the instance of the plaintiff, a shareholder of the old company, restrained by injunction such application of the funds.

THE bill stated that in 1845 an Act was obtained, authorising the construction of a line of railway from the town of Newry to Enniskillen, which passed near the city of Armagh. In 1847, 1848, and 1853, other Acts were passed amending that Act.

The plaintiff held twenty A shares in the company.

In the year 1856, the company determined to apply to Parliament for powers to extend the railway to Armagh, with a branch to join the extension line of the Ulster

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Railway to Monaghan. In order to comply with the standing orders, on the 17th of December, 1856, a subscription contract was signed, by which Messrs. Lattimore, Anderton, Burbidge, and Heaton subscribed each for 2000 10*l.* shares, Mr. Lewis for 1000 shares, and Mr. Stirling for 1000 shares. By the terms of the subscription contract it was provided, that each subscriber covenanted for himself, his heirs, executors, or administrators, that he should and would well and truly pay or cause to be paid the full amount subscribed by him, or such part thereof as should not have been paid at the time of the execution of these presents," as the directors of the said company should direct. The amount of capital required for the purposes of the Act was about 150,000*l.* The subscriptions amounted to about 120,000*l.*, being three-fourths of the capital.

It was also necessary, in order to comply with the standing orders, that one-tenth of the capital subscribed for should be actually paid into the bank; and, in order to do this, the defendant borrowed from the Union Bank of London, on the security of their joint promissory notes, the sum of 12,000*l.*, being one-tenth part of the subscribed for capital, 120,000*l.*, and paid the same into the Bank of Ireland, where it was duly invested in Consols. The bill was accordingly brought in, but, while it was before the House of Lords, the plaintiff, Mr. Spackman, and several other shareholders in the Newry and Enniskillen Company, presented a petition to the House of Lords, alleging that the subscription contract was only colourable, and for the purpose of passing the standing orders; that the parties named therein had not paid up the amount represented to have been paid up by them; and that, if the bill were to pass, the company would still be unable to make the proposed railway by reason of their financial embarrassments, as they had theretofore been, notwithstanding the four Acts they had already

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obtained. The petitioners prayed that their lordships' committee would reject the bill, or at least would insert a clause in the bill preventing the withdrawal of the deposit then lodged with the Court of Chancery in Ireland, until one-half of the capital authorised to be raised by the creation of new shares should have been paid up and expended on the works authorised by the Act; and prayed, that the bill might not pass into a law, or at least that clauses might be inserted therein for protecting their property and rights.

In consequence of this petition, the defendant James Anderton, who was then deputy chairman, was examined before the committee of the House of Lords, when he stated that his subscription was out of his own monies. Mr. Anderton and Mr. Lattimore were also examined before the committee of the House of Commons, when they stated, on behalf of themselves and the other subscribers, that they were acting as individual projectors, and not as trustees for the company, in subscribing for the amounts mentioned in the subscription contracts, and that they had paid the deposits thereon on their own account individually.

The Act was accordingly passed, by which the Newry and Enniskillen Railway Company was re-incorporated by the name of the Newry and Armagh Railway Company, with the same property, real and personal, claims and liabilities. The ordinary capital of the company was declared to be 55,660*l.*, divided in 5566 10*l.* shares; certain shares, called B and C shares, on which nothing had been paid, were extinguished; and it was provided, that from and after the passing of the Act, any person holding three shares in the series A of the dissolved company, upon which all the calls (9*l.*) had been paid, should in the stead thereof be deemed to hold a share of 10*l.* in the Newry and Armagh Railway Company, to be called a deferred share, upon which a call of 1*l.* might still be made, and should be entitled, within one month after

the passing of the Act, to receive a certificate for such deferred share upon presenting, at the principal office, the proper certificate. It was also provided (section 43), "that it should not be lawful for the company, out of any money by any Act relating to the company authorised to be raised for the purposes of such Act or Acts, to pay or deposit any sum of money which, by any standing order of either House of Parliament now in force or hereafter to be in force, might be required to be deposited in respect of any application to Parliament, for the purpose of obtaining an Act authorising the company to construct any other railway, or execute any other work or undertaking."

By virtue of the provisions of the Act, the plaintiff became entitled to six shares in the new company. The plaintiff had never registered his shares in the new company.

In November, 1857, negotiations were entered into between the plaintiff and the managing body of the new company in respect of the plaintiff's claim, but they resulted in nothing being arranged.

The plaintiff subsequently filed this bill against the directors and against the company, alleging, that the directors of the company had acted in collusion with Lattimore and others of the defendants, and had in their accounts entered the 12,000*l.* as a debt due from the company, and had charged the company with the interest payable to the Union Bank on the said loan, and which they stated to be a loan of 13,000*l.*, and that the bank having lately required 5000*l.*, part of the loan, to be repaid, and the five first-mentioned defendants having paid such sum, the directors had entered the bank as a creditor against the company for 8000*l.*, and the said five defendants as creditors for 1000*l.* each; and the bill prayed for a declaration, that the said sums, amounting to 12,000*l.*, ought to be paid by the above-mentioned

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defendants personally, and that they might be decreed to take up the said 12,000 shares.

Statement.

Mr. Wetherhead, a witness, deposed as follows:—"The directors borrowed a certain sum of money on behalf of the company, and out of that the entire parliamentary deposit was paid. That was what I meant when I said that Mr. Anderton's deposit was paid out of the company's money."

Argument.

Mr. *W. D. Lewis* and Mr. *Woodroffe*, for the plaintiff, contended that the conduct of the directors amounted to a fraud on the standing orders of the House of Lords, and was, therefore, void against all parties who were not privy to it. They cited *Davidson's case* (*a*), where a somewhat similar expedient was attempted. *Clement* v. *Bowes* (*b*) was also cited.

Mr. *Bacon* and Mr. *Beales*, for the defendants, contended, first, that the plaintiff was not entitled to sue, inasmuch as he had not converted his original shares under the provisions of the Act, or obtained any certificate of a deferred share, and consequently was not registered as a shareholder: *The Newry and Enniskillen Railway Company* v. *Evans* (*c*).

Secondly, it was contended that the plaintiff had agreed to compromise his rights, and could not maintain the bill, which was in violation of that arrangement.

Judgment.

THE VICE-CHANCELLOR:—

This bill is filed by the plaintiff on behalf of himself and other shareholders against the directors in the Newry and Armagh Railway Company. The object of the bill is, to prevent the funds of that company being charged with a sum of 12,000*l.*, being the amount mentioned in the subscription contract for the company on which the Act of 1857 was passed, as contributed by the defendants for their individual subscription. The plaintiff insists that they ought to be strictly held to the terms of that con-

(*a*) 4 K. & J. 688. (*b*) 1 Drew. 684. (*c*) 5 Rail. Cas. 275.

tract, and not to be allowed to debit the funds of the Newry and Armagh Railway Company in any way with the monies mentioned in that subscription contract.

The defence of these directors who subscribed the contract consists of three different propositions. First, it is contended that the plaintiff is not such a shareholder in the Newry and Armagh Company as entitles him to sue. Secondly, that by a compromise entered into with the company, he has precluded himself, even if he be a shareholder, from being entitled to maintain this suit. These two heads of defence resolve themselves into what may be called personal objections against the right of the plaintiff to maintain the suit. The third ground of defence is on the merits: and it is said that the plaintiff, if a shareholder and entitled to sue, is under no liability, and has sustained and can sustain no injury; and that, therefore, his bill ought to be dismissed.

Upon the first head, the right of the plaintiff to sue depends on his being a holder of twenty shares in a former company, called the Newry and Enniskillen Company; and he contends, and rightly, that upon the true construction of the Act of 1857 the registered shareholders of the Newry and Enniskillen Company, of which he is one, were so incorporated with the Newry and Armagh Company, as that, looking at the provisions of the Act, he is entitled to maintain the suit on behalf of the shareholders of the Newry and Armagh Company to protect the funds and the assets of that company.

The Act of Parliament of 1857, which constituted the Newry and Armagh Company, recites the existence of the Newry and Enniskillen Railway Company, and admits the existence of the class of shareholders in the Newry and Enniskillen Railway Company, of whom the plaintiff is one. It recites the circumstances under which the constitution of a new company—the Newry and Armagh —had become expedient: and then, after that recital, the Act of Parliament goes on, in the second section, plainly

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to enact, that all persons and corporations, who, on the day of the passing of this Act, were shareholders in the Newry and Enniskillen Railway Company, are thereby re-incorporated by the name of the Newry and Armagh Railway Company. Such is the constitution and incorporation of the shareholders of the Newry and Enniskillen Railway Company with the Newry and Armagh Railway Company, and, therefore, each shareholder of the Newry and Enniskillen Company, before he has registered himself as a shareholder of the Newry and Armagh Company, being, at the time of instituting such a suit as this, a shareholder of the Newry and Enniskillen Company, which is incorporated with the Newry and Armagh Railway Company, may maintain a suit such as this to protect the funds of the Newry and Armagh Railway Company from the injury suggested by this bill.

Looking at the 36th section of this Act, there can be no doubt that this is a just view of the position of the present plaintiff; for the second clause having declared that every shareholder of the Newry and Enniskillen Railway Company was, from the passing of, and by virtue of, the Act, incorporated as a shareholder in the Newry and Armagh Railway Company, it would seem to follow that, if registration be necessary to maintain a suit, a shareholder registered in the Newry and Enniskillen Company, who, as a registered shareholder in that company, is incorporated with the Newry and Armagh Company, is incorporated as a registered shareholder, and becomes a shareholder in the Newry and Armagh Railway Company.

But the 36th section (*a*) says that, in order to complete

(*a*) Newry and Enniskillen Railway Amendment and Extension Act, 1857:—

"XXXVI. The ordinary capital of the company is hereby declared to be 55,666 shares of 10*l.* each; and, for the purpose of so reducing the capital of the dissolved company, the series B and C shares (15 each, on

the title, every person holding such shares as the plaintiff held, shall, instead thereof, be deemed to hold a share of 10*l.* in the Newry and Armagh Company, to be called "the deferred shares." The effect of that is, that, instead of being a shareholder registered in the Newry and Enniskillen, he is to be deemed to hold a share in the Newry and Armagh Railway Company, upon which a call may still be made, and shall be entitled to receive, and shall, within one month after the passing of the Act, on demand thereof, receive, a certificate for such deferred share of 10*l.*, upon presenting at the principal office the proper certificate.

What this Act requires of a shareholder in the old company is not registration, in order to become a shareholder, but that, if he desires a certificate of his shares, he will get it after the date of one month from the passing of the Act, on application at the office, and on production of his shares. But the not having the certificate is no ground for saying that the registered shareholder of the Newry and Enniskillen Railway Company, who is incorporated and made a shareholder in the Newry and Armagh Company,

which nothing had been paid), shall be, and the same are hereby absolutely extinguished: and, from and after the passing of this Act, every person holding three shares in the said series A of the dissolved company, upon which all the calls shall have been paid, shall, in the stead thereof, be deemed to hold a share of 10*l.* in the Newry and Armagh Railway Company, to be called a deferred share, upon which a call of 1*l.* per share may still be made, and shall be entitled to receive, and shall, within one month after the passing of this Act, receive on demand thereof a certificate for such deferred share of 10*l.*, upon presenting at the principal office of the company, or at such other place as the directors shall appoint, the certificate of his three original shares of 20*l.* to be cancelled: Provided always, that no further call shall be made upon the said class A shares, and that there shall not be any greater call than 1*l.* made upon each of the deferred shares of 10*l.* into which the said shares shall have been converted, nor shall any call be made upon such deferred shares of 10*l.* each until 9*l.* per share has been called and paid up on the new shares to be created by the company."

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such as he was in the Newry and Enniskillen Railway Company, is not entitled to maintain such a suit as this. Therefore, the objection upon that ground to the right of the plaintiff to sue as a shareholder of the Newry and Armagh Company cannot be sustained.

The next ground of defence is, that a compromise was entered into between the Newry and Armagh Railway Company and the plaintiff, in consequence of a former litigation, by the result of which compromise, it is said, this plaintiff is so bound and concluded as to be no longer entitled to maintain any litigation against them.

But, on the evidence, the defendants' case, on this point, has wholly failed; and it is impossible, therefore, to hold, that the plaintiff is precluded, by what was done to compromise the dispute, from maintaining the suit.

The third ground of defence is on the merits. The case is a very simple one as stated by the bill. It states that the plaintiff, when application was made to Parliament for this Act of 1857, believed that the project of incorporation, if carried out by saddling the Newry and Enniskillen Company and their funds, or the incorporated company and its funds, with the amount necessary for the parliamentary subscription, would be disastrous and ruinous. He alleges that he presented a petition to Parliament opposing the bill on these grounds; and that, although the subscription contract, upon which the bill was founded, purported to be signed by those gentlemen who are defendants in this suit as subscribers on their own individual account, yet that such subscription was merely colourable, and that the truth was, whatever was the amount subscribed, these gentlemen would in the end come upon the funds of the company for repayment to themselves. Upon presenting that petition before the committee of the House of Lords, an inquiry was directed into the

truth of that allegation. It was necessary to examine some of the defendants. The defendant Anderton was examined; and, upon looking at his statement, I find that he states in the plainest and most distinct terms that his subscription was with his own individual money, out of his own funds, and that he and the others who had joined in the contract had raised the money necessary to meet the obligation of the subscription contract upon their own private credit. Upon that statement, and believing what the witnesses had said, the House of Lords was satisfied that the subscribers who had set their names to the parliamentary contract were dealing with their own monies upon their own private adventure, and were co-contributors out of their own funds for the purpose of the incorporation of these two companies. But the plaintiff by this bill states, that notwithstanding all this, what has happened has been that in the accounts, which are set forth in the twenty-third and twenty-fourth paragraphs of the bill, the company are, after all, debited with the very sums sworn to have been subscribed by these directors. But the case does not rest upon that statement; for it appears from the depositions of the witnesses, who are officers in the company, and who speak to what the truth was upon the occasion of subscribing this contract, that although the House of Lords acted upon the belief that these subscriptions were paid out of the funds of these individuals, the directors, in truth, borrowed money on behalf of the company. Mr. Wetherhead, the officer of the company, being asked in cross-examination, "Did the five first-named defendants—that is, to this cause—subscribe the parliamentary contract for 2000 shares each?" said, "I conceive that that is only nominally so; they did not pay the deposit of 1*l.* a share upon them. I was present at the committee of the House of Lords when Mr. Anderton was examined before them; I heard him

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give his evidence. I do not believe that Mr. Anderton took 2000 shares on his own account; he took them on behalf of the company. I should say, I believe he paid for the mout of the monies of the company." Then he goes on, "James Stirling subscribed," and so on; but upon re-examination, in order to better the case, he says, "The directors borrowed a certain sum of money on behalf of the company, and out of that the entire parliamentary deposit was made; that was what I meant when I said that Mr. Anderton's deposit was paid out of the company's money." Accordingly, in this account, which I have already stated is in the twenty-third and twenty-fourth paragraphs of the bill, the company is debited and credited with these sums, of course. If so, what becomes of the individual subscriptions of the gentlemen who made the House of Lords believe that they had out of their own pockets paid all this money, and were *bonâ fide* shareholders on their own account? Under these circumstances, when these gentlemen, instead of dealing with this subscription money as their own money, and taking the benefits or the burden of the shares for which they subscribed, shuffle it into the company's accounts on both sides, the plaintiff is entitled to ask the aid of the Court. There must therefore be a declaration, that the defendants except the company, are not entitled to charge or debit against the assets of the Newry and Armagh Railway Company, in the pleadings mentioned, the sum of 12,000*l.*, or any interest thereon, or any other sums for calls or otherwise, in respect of the amounts mentioned in the subscription contract in the pleadings mentioned as representing the sums subscribed for by the said defendants, on their own individual account. There must then be an injunction to restrain them from so debiting or charging the assets of the company, with liberty to apply; and with that there remains only the consideration of the costs of the suit.

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The plaintiff's conduct in the litigation has been very much objected to on the part of the defendants, not only as ungracious, but as improper and mistaken. His rights as a shareholder have been denied; and it is said that what took place upon a former compromise of a litigation with him ought to prevent the Court from allowing him to maintain this litigation now. I have already disposed of that so far as it affects the right of the plaintiff to a decree; but I now recur to it with a view of considering what is proper to be done as to the costs of the suit. The defendants say, that the charges in the bill are foul charges of fraudulently deceiving the House of Lords, and of obtaining an Act of Parliament upon a representation which was untrue. The rule of this Court is, that if a plaintiff complains of a fraud, and makes foul charges against the defendant, which turn out to be false, he ought to pay the costs of the suit. But a very different consideration arises when, upon an investigation of the case, although there may not be a justification for the grossness of the language used in calling the representations fraudulent, or for treating the matter as fraudulent before the House of Lords on the subscription contract; yet, substantially, to my apprehension, the conduct of the defendants, after the evidence given by them in the House of Lords, in their mode of debiting and crediting the company's assets with the money borrowed and the money paid in respect of the shares, has been improper. The plaintiff cannot justly be charged with having, in any undue manner, complained of that conduct on the part of the defendants which he calls a fraud upon the subscription contract. The case, therefore, is one in which the plaintiff has established his right to the relief which he prays to the extent of the declaration stated above. He is entitled to be paid the costs of the suit by the defendants who are named, but not by the company; and, therefore, the proper order will be to tax the plaintiff's

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costs of the suit, including the costs of the motion, to extend the time for taking evidence, and to decree payment of the taxed costs by all the defendants except by the company.

Re THE WINDING-UP ACTS. *Re* THE HEREFORD AND MERTHYR TYDVIL JUNCTION RAILWAY COMPANY. MAITLAND'S CASE.

1861.
March 8th.

On an application by the official manager of a company ordered to be wound up, the Court refused to put in the list of contributories, or to declare liable to contribute to the debts of the company, a provisional director and allottee of fifty shares, who had attended meetings and taken part in the proceedings, but had never signed the subscription contract.

THIS was an adjourned summons from chambers, and it asked for a declaration that Mr. T. F. Maitland was liable to contribute towards the payment of certain debts, &c., in the company; and, secondly, that he ought to be put on the list of contributories in respect of the fifty shares allotted to him.

In 1845, the railway company (the Hereford and Merthyr Tydvil Junction) was projected. The ordinary subscription contract was prepared, but the dates were never filled in, and the deed was never in fact completed or executed. Several gentlemen were mentioned in the deed, and published in the prospectus as members of the provisional committee, and among them Mr. Maitland. By that deed the usual powers were conferred on the directors to add to or diminish the number of the provisional committee or directors; to bind all the members of the committee, whether present or absent; to appoint a chairman; to appoint, suspend, or remove, and to re-appoint bankers, solicitors, engineers, surveyors, clerks, agents, servants, and workmen, and to pay and allow such salaries and recompenses as the said provisional committee or directors, or committee of management, as the case might be, should think right.

On the 9th of October, 1845, a meeting of the promoters took place, at which it was resolved that a committee of management should be appointed, and several persons were named, among whom was Mr. Maitland. It was resolved that the qualification for a director or member of the provisional committee was, that he should hold twenty-five shares; and, as appeared by the allotment-book, fifty shares were allotted to Mr. Maitland. On the 16th of October a meeting was held, at which Mr. Maitland presided as deputy-chairman, and as such signed the resolutions and the minutes. On the 29th of October Mr. Maitland and the other provisional committeemen consented to act. Numerous meetings took place, at which Mr. Maitland was present.

The scheme having proved abortive, the company was ordered to be wound up, and five classes were prepared of the persons liable to contribute to the debts of the company, consisting, in the events that happened, of thirteen persons. Class 4 consisted of the provisional committeemen and the directors; but the Master ultimately refused to sign the list, as the time for making out such list had expired. The official manager subsequently prepared a new list, described as list 5, of persons "liable to contribute to the payment of the liabilities or losses of the company." On the 21st of July, 1859, the Master settled the list as containing the names of Mr. Maitland, Sir J. E. Anderson, the Hon. F. Berkeley, Lieut.-Col. Hanmer, Mr. W. A. Hill, and Mr. A. Bethridge. The debts and liabilities were then ascertained, and certain small sums were found due, including a sum of 41*l.* 2*s.* to Messrs. Glyn & Co., in respect of cheques signed by Mr. Maitland and other directors. The principal claim was that of Messrs. Hill & Everill, which had been established against the company by an order of the Lords Justices, on the 20th of July, 1860, amounting to 2343*l.* 12*s.* 1*d.* There was also the claim of the official

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manager for costs, which it was estimated would amount to 1000*l.*

It was stated that Mr. Maitland was the only person from whom payment could be obtained. There was no evidence to show that Mr. Maitland had made himself liable at law for any of the debts other than the sum of 41*l.* 2*s.*

Argument.

Mr. *Malins* and Mr. *Hetherington*, for the official manager, contended, first, that Mr. Maitland had made himself liable for each of the debts by his personal acts. His name appeared in the prospectus; he had consented to act as a provisional director; he had attended the various meetings; had acted as deputy-chairman; and had generally taken part in the proceedings. It was submitted that he had thereby made himself liable for the debts incurred by the managing body during the course of such proceedings: *Upfil's case* (*a*).

Again, it was submitted that he was liable to be put on the list of contributories in respect of the fifty shares allotted to him: *Carrick's case* (*b*), *Morrison's case* (*c*).

Mr. *Baggallay* and Mr. *Druce*, for Mr. Maitland, contended that being an allottee simply was not enough to justify putting Mr. Maitland on the list. If the company had ever been formed, and Mr. Maitland had contracted in writing to take shares, it was admitted he ought to be put on the list of shareholders. But neither of these two things had been shown; and, if so, it followed, from all the authorities, that Mr. Maitland was not a shareholder.

It was not denied that Mr. Maitland was liable to be made to pay debts he had with others personally incurred, not as a shareholder, but as a private individual; but then, in order to make him liable to pay such debts, there must

(*a*) 2 Ho. Lds. Ca. 674.
(*b*) 1 Sim. N. S. 505.
(*c*) 20 L. J. N. S.; 15 Jur. 346.

be the same evidence that would be required in an action against him in a court of law by a creditor. Until that evidence was adduced—and nothing of the kind had yet been shown—the Court could not declare that he was liable.

[They cited, *Bright* v. *Hutton* (*a*), *Spottiswoode's case* (*b*).]

THE VICE-CHANCELLOR:—

The first application was, that Mr. Thomas Fuller Maitland's name should be put in class 4, as being liable as the holder of fifty shares.

If it had been necessary, I should have decided that point; but it is now too late, for the Master has come to a conclusion upon it; and I do not intend to alter what the Master has decided. The next part of the application is, that I should make an order at once on Mr. Thomas F. Maitland to pay four or five debts, in the aggregate amounting to a very large sum, on the ground that the Master had put him in class 5, among several persons who are said to be liable for debts of the company. But, at the bar, that application is varied; and I am asked only to declare that he is liable.

I should not be justified in making any order upon him to pay, or in making any declaration that he is liable, unless it were proved to my satisfaction that those debts in particular which are mentioned in the present application are debts which at law or in equity he is liable to pay; and, upon looking at the evidence in support of this part of the case, I find nothing to justify me in saying that, because this gentleman was upon the provisional committee, and did all that is alleged, I should at once decide, as by the verdict of a jury, that he employed Messrs. Hill & Everill or the engineer, and made him-

(*a*) 3 Ho. Lds. Ca. 341—387. (*b*) 6 De G. M. & G. 345.

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self legally or equitably liable for the entirety of those debts.

I can find nothing to justify that; and therefore I must refuse this application. I make no order as to costs, but simply refuse the application.

The official manager must have his costs out of the estate.

EMMET *v.* CLARK.

March 18*th*.

By a marriage settlement, a policy and monies thereby assured were assigned to four trustees on the trusts of the settlement, with power to the husband and wife, on and after the death of the survivor, or the continuing trustees, or, in case there should be no continuing trustee, for the retiring trustee, in case the trustees should die, or desire to be discharged, to appoint new trustees; and that the estate should be thereon assigned, so as to vest in such trustee jointly with the former trustees; and in case there should be no former continuing trustee, then in such new trustee or trustees only. Two of the trustees being dead, and two desirous of retiring, three new trustees were appointed, of whom one being afterwards desirous of retiring, a new trustee was appointed —*Held*, a valid exercise of the power.

THIS bill was filed by Mr. G. N. Emmet, C. N. A. Emmet, and J. Watson, against the Law Life Assurance Society, praying for a declaration, that the power of appointment under which the plaintiffs derived their title had been duly exercised, and that the plaintiffs were duly nominated and appointed, and qualified to give a due discharge.

By an indenture of settlement, dated 11th of March, 1835, made in contemplation of the marriage of Maria Ann Stevens and Thomas Brook Bridges Stevens, a policy of assurance on the life of the said T. B. B. Stevens, together with the sum of 1000*l.* thereby secured, and all bonuses and other sum and sums of money which might become payable by virtue of such policy, were assigned to N. Stevens, S. W. Raymond, S. W. Stevens, and T. H. Stevens, upon the trusts of the settlement. The settlement provided, that in case the trustees thereby nominated or appointed, or any or either of them, or any

succeeding or other trustees of the trust estate and premises therein comprised, to be nominated as thereinafter mentioned, should happen to die, or be desirous to be discharged of and from, or refuse, neglect, or become incapable or unfit to act in, the trusts or powers thereinbefore declared and contained, or should go to reside beyond seas before the same trusts should have been fully performed or satisfied, then, and so often as the same should happen, it should be lawful for the said T. B. B. Stevens and M. A. Stevens, during their joint lives, and after the decease of either of them, for the survivor of them during his or her life, and after the decease of such survivor of them, for the surviving and continuing or other trustee or trustees of the said trust estate and premises; or in case there should be no continuing trustee, then for the retiring trustee or trustees, in case the trustees, or either of them, should die, or be desirous of being discharged, by any deed, &c., to nominate or appoint any other person or persons to be a trustee or trustees, in the place or stead of the trustee or trustees so dying, &c.; and that when and so often as such new trustee or trustees should be appointed as aforesaid, all the trust estate and premises should be thereupon conveyed, transferred, assigned, and assured respectively, in such manner as that the same might be legally and effectually vested in the newly-appointed trustee or trustees, jointly with such former trustees as should be living and continuing to act; and in case there should be no former continuing trustee, then in such new trustee or trustees only, upon and for the trusts thereinbefore declared of and concerning the same, or such of them as should be then subsisting undetermined, or capable of taking effect, and that such new trustee or trustees might in all things act in the execution of the trusts and powers therein declared and contained, as fully and effectually as if he or they had been originally by that indenture appointed,

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and as the trustee or trustees in or to whose place he or they should come or succeed, could or might have done under or by virtue of those presents.

Statement.

The marriage took effect, and Mr. N. Stevens and Mr. Raymond died, leaving surviving Mr. T. H. Stevens and Mr. S. W. Stevens, who in 1858 became desirous of retiring from the trust. By a deed, dated the 5th of August, 1858, reciting the death of the two trustees and that the two latter gentlemen were desirous to be discharged, the husband and wife, in exercise of the power, nominated Mr. G. N. Emmet, Mr. C. H. Emmet, and Mr. Dowling, to be trustees, in the room of the four original trustees; and the trust estate, consisting of the policy and the money assured thereby, were assigned to the trustees upon the trusts of the settlement. By an indenture, dated the 27th of December, 1859, reciting that the said Dowling was desirous of being discharged, the husband and wife nominated John Watson to be a trustee, in the room of the said Dowling, and the said policy and monies were assigned to the trustees.

In May, 1860, Mr. T. B. B. Stevens died, and the monies assured by the policy became payable; but on the trustees applying for payment of the policy, and about 373*l.* for bonuses, an objection was taken, that the appointment of the trustees had not been a valid exercise of the power, and that consequently they could not give a valid discharge.

Argument.

Mr. *Malins* and Mr. *Daly*, for the plaintiffs, contended that, on the true construction of the deed, the appointment of one trustee would be a valid exercise of the power. But, even if the language were less favourable to that construction, there was no obligation on the donees of the power to appoint four trustees to discharge the trust.

In *Miller* v. *Priddon* (*a*), the appointment of one trustee only, the original number having been two, was held valid on appeal.

[The cases of *Meinertzhagen* v. *Davis* (*b*) and *Pool Bathurst Estate* (*c*) were referred to. See also *Hulme* v. *Hulme* (*d*), and *Fagg's Trust* (*e*).]

Mr. *Bacon* and Mr. *Faber*, for the Law Life Assurance Society, contended that the appointment of the trustees was invalid. Originally there were four trustees; and in *Meinertzhagen* v. *Davis* (*f*), Vice-Chancellor Knight Bruce laid down as the rule, that there ought to be an adherence to the original number of trustees where new trustees were appointed.

In *Ex parte Davies* (*g*), the appointment of more than the original number was held to be invalid.

[*The Earl of Lonsdale* v. *Beckett* (*h*), was also cited.]

THE VICE-CHANCELLOR:—

Judgment.

Cases may, and do, though not frequently, occur, in which the trust deed constituting the trust, and appointing a certain number of persons as trustees, expressly provides that the original number shall be kept up.

There are also cases, and the defendants contend that this is one, in which, from the language of the deed, it is to be implied that the intention was always to keep up the original number of trustees. In this case there were originally four trustees. The question is, whether the appointment of three trustees to take the place of four, by those who have the power of nominating trustees, is valid. I can find nothing to show an intention that the trustees

(*a*) 1 De G. M. & G. 335.
(*b*) 1 Coll. C. C. 345.
(*c*) 2 Sm. & G. 169.
(*d*) 2 M. & K. 682.
(*e*) 19 L. J. Ch. 175.
(*f*) 1 Coll. C. C. 345.
(*g*) 2 Y. & C. 468.
(*h*) 4 De G. & S. 73.

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should always be four in number, excepting the single circumstance that four trustees were appointed by the deed. The criticism of Mr. Daly upon the language of the instrument, in a great degree justifies his view, that the language will bear the construction that even one trustee might be appointed, and that not merely in a case where there is only one vacancy.

If the language will bear such a construction, it is sufficient to support the view for which the plaintiffs contend. I should much regret if I were forced to arrive at a contrary conclusion, because, if the real force and effect of what has been done is considered, there is no substantial ground upon which it can be said that the three trustees who have been nominated and appointed, and to whom the property has been conveyed, cannot give a complete and absolute discharge for the money. The question raised by this bill is, whether the trustees so appointed can give a valid discharge. The defendants' counsel were compelled to admit, that by the operative part of the instrument, the two surviving trustees, who clearly had the whole estate vested in them by the words of grant, transferred the whole estate to the three trustees. It is impossible to contend that they did not. But, if so, it follows that the three trustees in whom the property was vested have the legal estate.

It is said, however, that they could not have it, because they were not properly nominated. But a question as to a power of nominating a person to whom a conveyance may be made, is a very different one from that which arises in a case where the power is coupled with a direction that the person having it may be one of the new trustees. There is nothing in the language of this instrument that makes it imperative to have always four trustees; and, having regard to the practical operation of an instrument of this kind, it is quite plain that the trusts could not be conveniently executed if it were required that there should

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be always four trustees. On these grounds, the Court must hold that the defendants are bound to pay this money to the three trustees who were appointed by the instrument stated in the bill, and who are fully empowered to give a valid and effectual discharge.

On the question of costs, I have considered what sort of liability the defendants could have incurred if they had paid the money; and the more the matter is considered, the more clearly does it appear that the receipt of these three trustees could never have been questioned in any way. The estate is vested in them as trustees for all purposes; and, as the defendants have failed in the litigation which they provoked, the usual result must follow. The declaration will therefore be, that the three trustees have power to give a valid discharge, and that their costs must be taxed and paid by the defendants.

CUNNINGHAM *v.* BUTLER.

March 18th.
April 19th.

THIS was a special case for the opinion of the Court. The questions raised were:—

1. Whether or not anything more passed by the said devise upon trust in the said will of the said testatrix Sarah Goodwin, than the said houses which, at the date of her said will, were erected or were in course of erection, and were then used or occupied or intended to be used or occupied as lodging-houses?

Where a testatrix "gave all those her freehold messuages or tenements, hereditaments, and premises, called West Cliff, with the appurtenances thereto belonging, situate at West Cowes, and now used as lodging-houses;" and in a codicil referred to the same property as her estate, called West Cliff, at West Cowes—*Held*, sufficient to pass, besides the lodging-houses, other houses, of which some were unfinished; and also certain plots of ground, together with the site of a private road and of a church, then building, and the advowson, all known as the West Cliff estate.

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2. Whether or not the said messuage called Grove House, otherwise Cliff House, and the said advowson, the said fields and pieces of land, demised or intended to be demised on building leases and otherwise as aforesaid, and all other the hereditaments of or to which the testatrix was seised or entitled at the respective dates of the will and codicil, and generally known as West Cliff or West Cliff estate, or any or which of the said hereditaments, passed under the said devise?

Sarah Goodwin, late of West Cowes, in the Isle of Wight, by her will, dated November 17th, 1831, made the following disposition:—"I direct all my just debts, funeral and testamentary expenses, to be fully paid and satisfied by my executors hereinafter named, as soon as convenient after my decease. I give, devise, and bequeath unto my brother William Bennett, and my son-in-law the Rev. Maximilian Geneste, and the survivor of them, and the heirs, administrators, and assigns of such survivor, all that and those my freehold messuages or tenement, hereditaments, and premises, with the appurtenances thereto belonging, called West Cliff, situate, lying, and being at West Cowes aforesaid, and now used or occupied as lodging-houses, upon trust to receive the rents, issues, and profits of my said freehold messuage and premises during the life of my dear daughter Sarah Geneste, wife of the said Maximilian Geneste, to pay the same to or for the benefit of her, my said daughter, or to permit and suffer her, or her said husband, or her and their assigns, to receive the same for and during the term of her natural life, and to and for her and their use and benefit; and in case my said daughter should die, leaving the said Maximilian Geneste her surviving, then upon trust to pay one-third part or share of the said rents, issues, and profits of my said freehold messuages and premises unto the said Maximilian Geneste, or his assigns, for and during the term of his natural life, and to and for his own use and benefit.

And as to the remaining two-third parts or shares of the said rents, issues, and profits of my said freehold messuage and premises, to stand possessed thereof upon trust to or for the benefit of the children of my said daughter Sarah Geneste, and to be divided equally between them, if more than one; but if but one child, then to such child only for and during the life of the said Maximilian Geneste. And from and after the death of the said Maximilian Geneste, in case he should survive my said daughter, then I give and devise my said freehold messuage or tenement, hereditaments, and premises, with the appurtenances thereunto belonging, and the rents, issues, and profits thereof, unto my said trustees, or the survivor of them, his heirs, executors, administrators, and assigns, upon trust for the child, if only one, and if more than one, then for all the children of my said daughter Sarah Geneste equally to be divided between or amongst them, share and share alike, as tenants in common." After further provisions and bequests, the will proceeded thus:—"And as to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, both real and personal, not by me already disposed of, after and subject to the payment of my just debts, legacies, funeral expenses, and the charges of proving this my will, I give, devise, and bequeath the same and every part thereof unto my said daughter Sarah Geneste, her heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, and to and for her and their own use, benefit, and disposal absolutely." E. Bennet and M. Geneste were appointed executors.

At the date of her will, the testatrix was possessed of several freehold houses, generally known as the West Cliff or Cliff, or the West Cliff estate, and situate at West Cowes, and were as follows:—

A parcel of land, sold in 1832 by the testatrix to a Mr. Cass.

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Statement.

A piece of land, held by Simon Halliday from the testatrix's executors on a building lease for ninety-nine years from March, 1827, determinable on lives and renewable on payment of a fine, at a ground-rent of 45*l.* per annum; on which piece of land a dwelling-house had been erected, now in the occupation of Lady Cosway.

Thirdly, eight dwelling-houses, known by the names of Trafalgar House, Adelaide Villa, Avening Villa, Belmore House, and four cottages, which, prior to the date of the testatrix's will, had been furnished in order to being let as lodging-houses (Adelaide Villa was in testatrix's own occupation).

Fourthly, two messuages, called Cambridge House and Grove House, or West Cliff House, and a cottage (all in the course of erection), plantations, and grounds with two ice-houses thereon let separately, four fields let to a Mrs. Harris, a private road and a piece of land next the sea.

Fifthly, a piece of land comprised in the West Cliff estate, on which a church was then in the course of erection by the testatrix, and which was subsequently endowed by her.

The testatrix, by her codicil, dated November, 1833, proceeded as follows:—"Whereas I have in and by my will given and bequeathed to my son-in-law, the Rev. Maximilian Geneste, in case he should survive my daughter Sarah Geneste, one-third part of the rents, issues, and profits of my freehold messuage or tenement, hereditaments, and premises, called West Cliff, situate and being at West Cowes aforesaid, for and during the term of his natural life; and having since the making such will otherwise provided for my said son-in-law, in lieu of the rents, issues, and profits of my said freehold estate, in case he should survive my said daughter, now I do hereby revoke and make void such bequest to my said son-in-law of the rents, issues, and profits of my said freehold estate, in case he should survive my said daugh-

ter, and do hereby bequeath the whole of the said rents, issues, and profits of my said estate, after the death of my said daughter, to the trustees named in my said will, or to the trustees acting under the same, upon the same trusts as I have in and by my said will directed the two-thirds of such rents, issues, and profits of my said estate for the benefit of the child or children of my said daughter Sarah Geneste, during the life of the said Maximilian Geneste, and under the same provisions and powers in case of his death."

The testatrix died on the 9th of January, leaving M. G. Geneste her heir-at-law, who claimed to be entitled to parts of the real estate as undisposed of.

In the events that happened, questions arose as to what passed under the will; the trustees contending that there passed to the trustees of the testatrix's will only so many of the lodging-houses as at the date of the will, or at most at the date of the codicil, were then actually erected or in the course of erection, with the ground and buildings appertaining to them; and that the house called Grove House, with the lodge, plantations, and grounds belonging thereto, and the advowson of the church, and the fields above mentioned, and also the pieces of land demised or agreed to be demised in building leases, did not pass by the will of the testatrix.

The defendants were the other children of Sarah Geneste; and their assigns and mortgagees contended that the devise to the trustees was sufficient to include Grove House, otherwise West Cliff House, the advowson, the several fields, pieces of land, and all other the hereditaments to which the testatrix was seised or entitled at West Cliff at the time of making her will and codicil respectively, and which were then known by the name generally of West Cliff, or the West Cliff estate.

It appeared from the evidence, that the will and codicil contained several interlineations which were not attested.

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CUNNINGHAM v. BUTLER.

Mr. *Malins* and Mr. *J. N. Higgins* appeared for the plaintiffs.

Argument.

Mr. *Murray* appeared for the other parties, and cited *Goodtitle* v. *Southern* (*a*), *Stone* v. *Greening* (*b*), *Down* v. *Down* (*c*), *Hall* v. *Fisher* (*d*).

Judgment.

THE VICE-CHANCELLOR:—

When the testatrix uses the words, "all those my freehold messuage or tenement, hereditaments, and premises, called West Cliff," she uses language sufficiently comprehensive to pass the whole of her estate at West Cliff, including the land and houses and the advowson.

It is an established rule of construction, that clear words of general import are not to be cut down on mere implication arising from the use of subsequent words.

Both the questions must, therefore, be answered in the affirmative. The costs of all parties to be paid out of the estate.

Feb. 11*th*, 12*th*, 13*th*. *April* 20*th*.

TOWLE *v.* THE NATIONAL GUARDIAN ASSURANCE SOCIETY (*e*).

A policy granted to guarantee the honesty of a tax-collector, stated to be based on a declaration, signed by the collector, which consisted of answers made *bonâ fide*, in part incorrect, but substantially correct, to questions proposed by the society, and signed by the applicant and by the overseers, but not by the Commissioners of Taxes, the real employers—*Held* valid.

Distinction between a mere declaration and a warranty. *Anderson* v. *Fitzgerald* (*f*), observed on.

THIS bill was filed by the plaintiffs, as sureties of one John Roberts, the collector of assessed taxes for Salford, against the National Guardian Society and the Albert Assurance Company, for the purpose of obtaining a

(*a*) 1 M. & S. 299.
(*b*) 13 Sim. 390.
(*c*) 7 Taunt. 343.
(*d*) 1 Coll. 47.
(*e*) In this case the Lords Justices differed with His Honour, and reversed the decree.
(*f*) 4 Ho. Lds. Ca. 484.

declaration, that both societies were liable to pay the plaintiffs the sum of 654*l.* 15*s.* 1*d.*, and the costs of the suit, and any other costs or losses occasioned to them by the defalcations of Roberts, not exceeding in the whole 1000*l.* upon all the subscribed capital, funds, and other effects, of the defendants, the National Society, in existence at the date of the policy, or subsequently acquired by the society, and also upon the subscribed capital, funds, and other effects, of the defendants, the Albert Company, and that such defendants might be ordered to pay such sums to the plaintiffs, or in default for a sale.

In the year 1853, John Roberts was appointed the collector of taxes for Salford, and he and the plaintiffs executed a bond for 1000*l.* to the commissioners for the division of Manchester, for the honesty of the said John Roberts, and for the due performance of his duties. Roberts, in pursuance of a previous agreement with two sureties to do so, effected the policy in question with the National Guardian Assurance Society, of Moorgate Street, London, at their branch office in Manchester.

On the application, a paper, containing certain questions, was given to the applicant, to be filled up and signed by the applicant and employer.

Questions to which answers are required both from the applicant and employer:—

Q. Whether the amount required is the only security; if not, what other sum?

A. The only security.

Q. The largest sum at any time to be held in his hand, and for how long a time?

A. From 100*l.* to 200*l.*; not longer than a week.

Q. The checks used to secure accuracy in his accounts?

A. Checked weekly by surveyor of taxes.

Q. Whether the balance agreed at every such period will be then paid over?

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A. Yes.

Q. Whether his capability of settling such balance will be occasionally tested by his employer?

A. Yes.

I hereby declare that the above answers contain the truth, without any mental reservation whatsoever in any part.—JOHN ROBERTS.

The paper was not signed by the commissioners of taxes, but by Mr. Owens, the overseer, who was described as the employer.

The society having agreed to grant the policy, on the 3rd of September, 1853, Roberts paid to the Manchester agent of the society the sum of 10*l.*, and thereupon received from him a receipt, signed by the London secretary, and shortly after, the policy, which was in the following form:—

"Guarantee Policy. No. 1322. 1000*l.*

"National Guardian Assurance Society. Completely registered. No. 1322, &c.

"Whereas the Commissioners of Assessed Taxes, No. 70, George Street, Manchester, have agreed to receive and take into their employ John Roberts, of 93, Stephens Street, Salford, Manchester, as the collector of the said commissioners of taxes, upon condition of the said John Roberts procuring a guarantee to the amount of 1000*l.* against any such loss as hereinafter mentioned: and whereas the said John Roberts, in performance of the said condition, and with the approbation of the said commissioners, has agreed with the National Guardian Assurance Society for the grant to the said John Roberts of this present policy of guarantee; and as the basis thereof, the said John Roberts has deposited at the office of the said society, at No. 19, Moorgate Street, in the city of London, a certain statement in writing, dated

the 11th of August, 1853, and indorsed and headed, 'Questions to be answered by the employer or proposed employer, and the employed or proposed employed,' containing, amongst other things, a declaration, signed by himself, of the truth of the answers thereby made or given to the questions therein contained: and whereas the said John Roberts, at the request of the said employers, has paid to the said society the sum of 10*l.*, as the consideration or premium for such guarantee as is hereinafter contained, for the term of one year, commencing from the 3rd day of September, 1853, and ending on the 3rd day of September, 1854, both inclusive: now, therefore, this policy witnesseth, that in consideration of the premises, the said society doth hereby agree and declare, that during the term of one year so commencing and ending, as aforesaid, and from and after the determination thereof, and during every subsequent year, that the society shall agree to receive and the said John Roberts shall on or before the 3rd day of September in the same year pay to the said society the annual premium of 10*l.*, the subscribed capital for the time being, and other the funds and property of the said society, shall to the extent in the whole of 1000*l.* be liable according to the deed of settlement and rules of the said society (hereinafter more particularly referred to), to make good to the said employers, their representatives and assigns, any and every loss which the said employers shall have sustained during the continuance of this guarantee, in consequence of the want of honesty or fidelity, or of the wilful or culpable default or negligence of the said employed, in or in respect of his said employment, and that payment of such loss shall be made by the society out of the said subscribed capital, funds, and property, if sufficient, or to the extent to which the same shall be available for that purpose, under the proviso hereinafter next set forth, within three calendar months after satisfactory

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proof of such loss shall have been given to the board of directors of the said society. Provided always that this policy shall be subject to the rules of the said society endorsed hereon. . . . .

In witness whereof, the undersigned, being three directors of the said society, have, for and on behalf of the said society, hereunto set their hands, and the said society hath set its common seal, this 26th day of April, in the year of our Lord, 1854.

"J. ROBERTS.
"F. GOSNELL.
"ROWD. RONALD."

On the policy the following was indorsed:—

"The rules referred to by the within policy of guarantee.

"Any misrepresentation, whether arising from a false statement, or from the suppression of the truth, or from any other cause, in any declaration, in consequence of which a policy is granted by the company, will render such policy void from the beginning.

"When the policy is granted in consideration of the payment of an annual premium, such premium must be paid within thirty days from the day on which it shall become due, otherwise the policy will become void; subject, however, to a discretionary power vested in the board of directors within six calendar months to revive such policy, &c. All claims must be made within three calendar months after the death or termination of the engagement of the party whose fidelity is guaranteed, and shall not be made afterwards.

"When a liability has been incurred under this policy, the party entitled to make a claim in respect thereof must immediately, upon discovering or receiving notice that such liability has been incurred, forward a written statement of all the particulars thereof, as far as he can, to the

board of directors, and this policy shall become absolutely void as to existing and future liabilities if such claimant shall neglect or omit, for ten days after making such discovery or receiving such notice, to forward such statement as aforesaid.

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"After such statement shall have been given by the party entitled to make such claim to the board of directors, this guarantee shall be void with regard to all acts or omissions of the person whose conduct is so guaranteed subsequent to the date of such notice.

"In case the person whose fidelity is assured by the policy shall die within thirty days next after the premium in respect of such assurance shall have become due, but before payment of such premium, this policy shall notwithstanding be valid, provided the premium thereon be paid within such term of thirty days."

Simultaneously with the guarantee policy Roberts surrendered a policy he had on his own life in the Argus Assurance Company for 300*l.*, and effected one, as he deposed, in the National Guardian Society for the same amount, in consequence, he deposed, of being told that unless he insured his life the office would not grant the guarantee policy. He duly paid the premiums on both policies. The receipt in September, 1856, which was not printed, was given in the following form:—National Guardian Assurance Society, 19, Moorgate Street, London. No. 1332, 10*l.* Received this 29th day of September, 1856, of the Commissioners of Taxes, Salford, the sum of 10*l.*," &c., and was signed, "THOS. C. HILL, Agent."

In July, 1857, Roberts received a printed circular from the Albert Company, stating that the business of the National Guardian Society had been transferred to the Albert Company, and requesting him to forward the policy to be exchanged, which he accordingly did, and received the following receipt:—

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"19, Moorgate Street, London, S.
"13th July, 1857.

"Received from Mr. John Roberts, policy No. 1319, 20, 21, for 300*l.*, to be exchanged for a policy in the Albert and Times Life Assurance and Guarantee Company for the like amount. CHARLES C. GREEN."

The bill alleged that, about the month of September, 1857, Roberts attended at the office in Manchester, for the purpose of paying the premiums, when he saw Mr. E. P. Bidder, who informed him that the National Guardian Society was amalgamated with the Albert and Times Life Assurance and Guarantee Company, of which he, Bidder, was the district manager. Bidder further informed Roberts that the printed receipt for the premium had not been sent down from town, but that he could accept the premium and give a written receipt; but on Roberts objecting, that he preferred a printed receipt, Bidder promised to write to the Albert Company, to ascertain why the printed receipt had not been sent down, and asked Roberts to call again. On the 22nd Roberts called, and was informed by Bidder that the Albert Assurance Company had agreed to continue the policy, and had authorised him, Bidder, to receive the annual premium, and to give a receipt, which would keep the policy alive; and stated that no new policy would be required. On this representation Roberts paid the premium, and received from Bidder a receipt in the following terms:—

"Albert and Times Life Assurance and Guarantee Company, Branch Offices, 65, King Street, Manchester, 22nd Sept., 1857.

"Received from Mr. John Roberts the sum of 10*l.*, being the amount of annual premium for guarantee of 1000*l.* with the National Guardian Assurance Company,

now amalgamated with the Albert and Times Assurance Companies, from this date to the 22nd Sept., 1857.

"For the directors,

"S. P. BIDDER, District Manager."

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On the same occasion he paid the premium on the life policy.

In October, 1857, the commissioners of taxes gave notice, that there was a deficiency in Roberts' accounts of nearly 3000*l.*, but the amount was ultimately ascertained to be 645*l.* 15*s.* 1*d.*, which the plaintiffs were compelled to make good. They immediately, on discovering the defalcation, sent notice to the officers of the National Guardian and the Albert Companies, demanding from the latter payment of the policy, and, their demand being refused, ultimately filed this bill.

In answer to the plaintiffs' claim, the defendants relied on two grounds of defence. First, they contended that the guarantee policy was void by reason of misrepresentations made at the time it was effected. The alleged misrepresentations were, principally, that Roberts would only have from 100*l.* to 200*l.* per week at a time in his hands, and that the accounts were checked weekly by the surveyor of taxes. On these points there was conflicting evidence. Mr. Nicholson, a former inspector of taxes, and Mr. Silversides, surveyor of taxes down till August, 1857, proved that it was not the duty of Roberts to account weekly, nor did he do so, neither were his accounts checked weekly. Mr. Atkins, a former collector of taxes for the same district, proved that the practice had been for the collector to account, and to have his accounts checked, weekly.

On the second point, the National Guardian Society, by their answer, sought to show that Roberts, in April, 1856, knew that the National Guardian Society had relinquished the guarantee business; but this was positively

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denied by Roberts. That, in the year 1853, Hill was the agent for the National Guardian Society guarantee business, and Bidder for life business only; that, according to their course of business, in no case was an agent authorised to give any receipt for a premium except a receipt signed by the secretary or assistant secretary, and previously forwarded from town to the country agent for the purpose; that in August, 1855, a resolution was passed that the Society should cease taking guarantee business; that from that time the Society issued no more guarantee policies, or renewed guarantee policies already issued, except policies which were both policies of assurance on the life of the assured and guarantee policies, which could not be discontinued without the consent of the assured; that no receipt was issued by the society to Hill, or any other person, for the premium on the policy in the bill mentioned as falling due on the 3rd September 1855, or for any subsequent premium; nor did he in any way have any authority to receive the same, or any of them, or to account to the society for the same; that, to the best of their belief, in the latter part of 1856, Hill absconded considerably indebted to the society; that if he signed such receipt as alleged in the bill, he had no authority whatever from the society for so doing, and his so doing was entirely out of the usual course of business. Such receipt was not in the form of the receipt given by the society, and they did not believe that it was printed by the society.

By articles of agreement, dated the 4th of February, 1857, between the National Guardian Society of the one part, and the Albert Life and Times Assurance Company of the other part, it was witnessed, amongst other things, that it was agreed that the business of life insurance hitherto carried on by the society should absolutely belong to the Albert Company upon and from the 1st of January, 1857; and the said company should be entitled to all premiums which

that should become due and payable on and after the 1st January, 1857, in respect of the several life policies then already or which should be thereafter granted; and that the company should take upon themselves and become responsible for the payment and liabilities of the society in respect of life policies then already granted, in all cases where the policy monies should become payable by reason of the dropping of any life or lives on or after the 1st of January, 1857, but in no other case; and that all other debts and liabilities of the society, save and except such liabilities as were thereinbefore agreed to be paid by the said Albert Company, should be paid and discharged by the said National Guardian Society; and that all books, papers, in the custody or power of the society relating to the life assurance business of the society, should, upon payment of the consideration money (13,000*l.*) be delivered over to officers of the company.

On the 1st of January, 1857, Mr. Darke became acting secretary of the society.

On the 3rd and 4th of March, 1857, a resolution was passed that the society be dissolved; from that time Mr. Bidder ceased to be the agent of the National Guardian Society, but became the agent and district manager of the Albert Company.

The Albert Company, by their answer, alleged that Mr. Bidder only accepted the receipt provisionally until he heard from the head office, and only in case the Albert Company had any guarantee policy; that, on it appearing there were none, Bidder had intended to return the premiums, which he would have done but for Roberts having absconded.

They denied that the Companies were amalgamated, and alleged that the Albert Company had purchased the life business of the National Guardian Society only, and at the time of the purchase were not aware that

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there was any guarantee business; they denied that they had received any part of the assets of the National Guardian Society which were liable to pay the guarantee policies; that, by the terms of the deed, their liability was limited to monies payable by the dropping in of any life or lives.

Mr. *Malins* and Mr. *Pemberton* for the plaintiffs:—

In this case, it is proved by the evidence that the representations, which it is said are untrue, were made *bonâ fide*. They were not a warranty, but a mere declaration, and if inaccurate, but made *bonâ fide*, they would not vitiate the policy. In the case of *Benham* v. *The United Guarantee and Life Assurance Company* (*a*), a very similar question arose. The person whose character was guaranteed was secretary to the Marylebone Literary Institution; and the question as to the mode of conducting the business was very like that to be pursued in this case. The question was, "The checks which will be used to secure accuracy in his accounts; and when and how often will they be balanced and checked?" The answer was, "Examined by Finance Committee every fortnight." It turned out that no such fortnightly examination was made, but the Court of Exchequer held that the statement was not a warranty, but a mere representation. and its inaccuracy did not therefore vitiate the policy.

On the other point, it was established by the evidence that, the premium having being paid by the proper agent, the Albert Society could not now object to discharge the liability they had incurred by their union with the National Guardian Society.

Mr. *Greene* and Mr. *Southgate* for the National Guardian Society:—

It was beside the question whether the statements which it is admitted were in fact untrue, were

(*a*) 7 Ex. 744.

made *bonâ fide* or were immaterial. In the case of *Anderson* v. *Thornton*(*a*), it was held that misrepresentation or concealment not fraudulent would avoid a policy. In *Duckett* v. *Williamson*(*b*), a statement untrue in fact, though not to the knowledge of the person making it, was held to occasion a forfeiture of the premium. The same doctrine was laid down in *Gorham* v. *Sweeting*(*c*).

But in the case of *Anderson* v. *Fitzgerald*(*d*), the doctrine was carried somewhat further. The question arose on an appeal from the Irish Court, which left to the jury to say whether the misstatements were material. The point arose on a life policy. The 21st question to be answered was as follows: "Did any of the applicant's near relations die of consumption or any other pulmonary complaint?" Answer, "No." 22—"Has the party's life been accepted or refused at any other office?" "No." It appeared from the evidence that two of the insured's sisters died of consumption, aged sixty-five and sixty-seven respectively. It was left to the jury to say whether the error in fact was material, who found it was not. By the terms of the policy, any untrue statement made the policy void. At page 509, Lord St. Leonards said, "the word 'true' must be used in its general sense, whether the man knew it or not. It is beside the question whether the misrepresentation is material or not, the truth of it was the basis of the contract."

On the other point in the case, it was submitted that the guarantee policies were only for a year. The society were not bound to renew them, and had resolved not to do so; what the agent did, even supposing Bidder was the society's agent at the time, was without authority.

Mr. *Bacon* and Mr. *J. J. Jervis*, on behalf of the Albert Company, submitted that the Company had

(*a*) 8 Ex. 425.
(*b*) 2 Cro. & M. 384.
(*c*) Wms. Saund. vol. 2 (note) 200 *c*, 201.
(*d*) 4 Ho. Lds. Ca. 484.

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nothing to do with guarantee policies, and that the agent only accepted the premium until he had heard from London.

THE VICE-CHANCELLOR:—

This suit has been instituted to recover the money purported to be secured by a policy of assurance of that kind called a guarantee policy.

The right of the plaintiffs is disputed on various grounds. It has been argued, that before the loss occurred the policy had ceased to be effective; and, moreover, that it never was a valid policy, because there was a misrepresentation in the written statement which forms the basis of the contract.

If the defendants could show that the policy was invalid on the ground of misrepresentation, it would be needless to consider the other grounds of defence.

The first question, therefore, is whether the defendants have proved misrepresentation. According to the terms of the proposal answers were required, not only from the applicants for the policy, but from the employers. The proposal states that the employers are the Commissioners of Assessed Taxes. Instead of resorting to the commissioners, the defendants accept the answer of the overseer. His answer, which the defendants allege to be false, is, that the accounts will be checked weekly by the surveyor of taxes. It is stated in the printed proposals that the answer to this class of inquiries will be governed by the employment. Looking at the nature of the employment and the position of the person whose answer is accepted, it seems impossible to treat the answer as a warranty. It is a representation of a third party of the course intended at the time. The evidence of Atkins, who was the immediate predecessor of Roberts, proves that he was required to account for and pay over all balances weekly.

In the present case, as in *Benham* v. *United Guarantee*

and Life Assurance Company, the representation which is objected to is no more than a declaration made by a person who is not a party to the contract as to the course intended to be pursued by another person. Therefore it cannot amount to a warranty.

The case of *Benham* v. *United Guarantee and Life Assurance Company* is an authoritative decision on this point. None of the other cases cited during the argument are inconsistent with it. Policies on life insurance and ship policies are contracts for security against losses to be incurred under circumstances entirely different from the loss contemplated by this policy.

The decision of the House of Lords in the case of *Anderson* v. *Fitzgerald* proceeded on the ground that, when a warranty of a previously existing fact is part of the contract for life insurance, the materiality of the fact is important, and its falsehood is fatal to the contract. But in this case the representation referring not to a past or existing state of things, but to the future acts of other persons, the principle of the decision in *Anderson* v. *Fitzgerald* has no application. The representation now in question is shown to have been fairly and honestly made—to be substantially correct; and on this part of the case the defence seems to me to have failed entirely.

But the defendants also contend, that if the policy was valid, it was only in its terms to last for one year, and that the Guardian Company gave sufficient notice that it was put an end to, and that it expired in September, 1856. There is no evidence sufficient to support the case of the defendants on this point. What is principally relied on by the defendants as evidence of notice is a printed report of the directors of the Guardian Association, which is said to have been communicated to Roberts in April, 1856. But Roberts positively denies that he received

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this report, and there is no sufficient proof that he received it. Even if he did receive it, the sort of notice conveyed by such a document is much too vague, and the subsequent acts and conduct of both parties make it amount to nothing. Subsequently to the date of this alleged notice, the agreement was made between the two companies, by which in effect the life policy and all the obligations upon it were transferred to the Albert Company.

It is impossible on the true construction of the contracts to separate the life policy from the policy of guarantee. The terms on which the guarantee policy was effected made it compulsory to effect the life policy. On the life policy there was a memorandum indorsed, which stated its connection with the guarantee policy. The contents of this memorandum on the life policy gave the Albert Company distinct notice that, but for the purpose of keeping up the guarantee policy, there was no purpose to be served to the person assured by paying the premiums necessary to keep the life policy in force. Therefore, the assignment of the life policy to the Albert Company and the entry of it in their books being notice of the connection of the two policies, the receipt by the Albert Company of the premiums on the life policy was the receipt of money which they must be considered to have known was paid to them with a view to purchase the benefit of both policies. If at the time of the last payment on the life policy the Albert Company considered that the guarantee policy had expired, they were bound to say so, having notice of the connection of the two policies.

It is admitted that on the 22nd of September, 1857, the premium was paid on the life policy; but, according to the defendants' case, at that date and without any notice to the plaintiffs, the guarantee policy was treated as expired. This view excludes the fact that authorised

agents of the defendants had, with the knowledge of the Albert Company, dealt with the guarantee policy as still subsisting and received premiums upon it.

It is said that the acts of Bidder do not bind the defendants. But it is proved that both Hill and Bidder were agents authorised to receive premiums. Hill was the agent whose name was on both the policies. The payment of premiums to Hill was a payment to an agent authorised to receive money.

It is argued for the defendants that Hill's agency was limited to exchanging receipts of a particular form for the money. But unless the plaintiff had express notice that the payment to the agent would not be considered as a good payment, unless the receipt for it was in a particular form, there can be no importance in the form of the receipt. Where the fact of payment to the agent is proved, and the specific purpose for which the payment was made, the written receipt given by the agent is no essential part of the evidence. A receipt in writing is only *primâ facie* evidence of payment, and is only taken as a convenient evidence of the fact of payment, but that fact may be proved more perfectly in another way.

Generally speaking, whoever deals with an agent is bound to know the extent of his authority. Where there is an agency with authority to receive money on behalf of the principal, that is authority enough to acquit the person who pays. No private arrangement between the agent and the principal as to the peculiar form of a receipt in writing can be binding on a person who has no notice of the arrangement: nor does it constitute any part of the extent or nature of the authority which the person dealing with the agent is bound to know.

On both the policies the Guardian Society alone was liable, according to the terms of the contracts. But the

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Guardian Society sold and transferred to the Albert Company the right of receiving the premiums on the life policy. By the receipt of these payments of premium, paid for the specific purpose, the Albert Company are bound on both policies, unless they can distinctly prove a release or extinction of the obligation on both.

As to the objection by the Guardian Society, that notice of the loss was not given to them within the time prescribed, it has no force. When the loss occurred, the Albert Company was that with which, by the arrangement of the Guardian Society, the business was transacted, and the time of notice to the Guardian Company, which had ceased to transact the business, became immaterial.

Upon the whole, the result of a fair examination of the terms of the contracts created by the two policies and the conduct of the parties seems to be, that the plaintiff has established his right to a decree against both companies for payment of the amount secured by the guarantee policy and the costs of the suit.

April 29th.

BROCK *v.* KELLOCK.

Evidence of the performance of any vital act, such as the beating of the heart, is enough to constitute legal proof that a child was born alive.

THIS bill was filed to administer the estate of Thomas Corral. By his will, dated the 1st of October, 1825, Thomas Corral the elder gave all his estate and effects to trustees, on trust to pay the interest and dividends to his wife, Elizabeth Corral, for her life, and after her

death on trust to divide the same between his son Thomas and his daughter Elizabeth, in equal shares, when they should attain the age of twenty-one years. The testator died in 1827, leaving his widow and two children him surviving.

In 1841, Thomas Corral the younger married the plaintiff, Miss Patey, and died in 1842, intestate, leaving his widow *enceinte*, who gave birth to a female infant on the 22nd of March, 1843. The only question in the cause was, whether that infant was or was not born alive. It certainly died shortly after its birth.

On the 9th of July, 1859, the widow of Thomas Corral the younger, and mother of the infant, married S. Brock, her present husband. John Kellock was the husband of Elizabeth S. Corral, who died in 1851. The testator's widow died in April, 1860, and on her death letters of administration of her estate were granted to John Kellock, who thereby became the legal personal representative of the testator, and also of his late wife.

The plaintiff claimed to be entitled to the whole of the share of Thomas Corral the younger—that is, to one moiety of the testator's estate—on the ground that the infant was born alive, and consequently was capable of transmitting to her mother one moiety of her father's share. It was contended by the defendants that the child was born dead, and, therefore, incapable of transmitting any interest, which would cut down the plaintiff's interest to one moiety only of her deceased husband's share. The question turned entirely on the evidence, as to whether or not the infant was born alive.

At the hearing of the cause certain inquiries were directed; the cause now came on for further consideration. The evidence was as follows:—

Dr. Freeman, the accoucheur who attended Mrs. Corral in her confinement, deposed as follows:—I verily believe the child was born alive. When it was born it

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was very weak, and I had great doubts whether I could save its life. When I believe that a child is born alive, I always place it in warm water, which I never do when it is still-born. Believing the child to be born alive, I placed it in warm water according to my usual practice, and used other means to sustain its vitality, but without success. I should not have adopted these measures had the child been born dead.

On cross-examination, he deposed: It was Mrs. Corral's first confinement, and she was very ill. I was satisfied that the child was alive. I am quite sure the child was alive immediately before the last expulsive effort. I felt it move, and after it was born I felt a slight pulsation at the funis. It is not unusual for a child not to cry when the labour has been very protracted. The child's existence became separate from the mother at the moment that I divided the funis, and I felt a very weak pulsation of the funis attached to the child, and I therefore believed it to be alive, and applied methods for its restoration. I gave up all hopes of saving the child within a few minutes, as the funis had gradually ceased to pulsate. This was soon after it was put into the bath. When I am not satisfied that a child is dead, I usually order it to be put into a warm bath, and sometimes even if it is still-born. I did not notice whether the eyes were closed or open, and I did not notice that the eyes were very bright or very beautiful when in the bath. I did not observe that the child breathed or moved after it was born; my attention was directed to restoring its vitality, as there was still a feeble action going on at its funis. This feeble pulsation of the funis clearly showed circulation was going on in the child independent of the mother. Although I did not notice that the child breathed, I believe it was quite capable of breathing, from the pulsation which I felt at the funis. I believe the child was alive several minutes after it was separated from its mother, and that it died from the severity of the labour.

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Mrs. Fowell, widow, who was present, deposed that about half an hour after the birth, she went into the room to which the child had been taken. She found it was in a warm bath; its eyes were wide open, and she was particularly struck with their brightness and beauty. She remembered calling the nurse's attention to them. They had all the appearance of life in them. She then believed, and still believed, that at that period the child was alive. She afterwards saw the child in its coffin, when the eyes were closed.

Mrs. Brock, the mother, said that the child was born alive, and up to the period of its birth she had a distinct recollection of having felt the child to be alive. She believed the child survived its birth two hours or thereabouts.

On behalf of the defendant the following evidence was adduced:—

Dr. Robert Lee, of No. 4, Savile Row, physician, deposed, that having read Dr. Freeman's evidence, he had no hesitation in declaring it to be his opinion that in this case the child was not born alive. He founded his opinion on the following circumstances, viz.:—"According to both Scotch and English law, a child cannot be said to be born alive unless it breathes. If the funis of the child is felt pulsating while the fœtus is within the uterus, that is held by all medical men to be a proof that the child is alive before its birth; whereas, if the funis has ceased pulsating, the conclusion is that the child is dead. The pulsation of the funis continuing after birth, proves that the child is alive in the same sense as it was before birth. I mean by that, that the child has a sign of uterine life still extant; but the pulsation does not prove that the child is alive, because another function of life is required to constitute life, viz., that of respiration. The pulsation of the cord is a symptom that there is that continuing circulation of the heart which has sustained the life of the child while in the mother's womb; but before a child can

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be said to possess independent life it must respire. The circulation of the heart would induce respiration, and without it respiration cannot take place. The circulation of the heart forms only one symptom of life, and that a minor symptom; and respiration must ensue before a child can be said to live. The gradual cessation of pulsation in the funis is what I should expect to find in a child that had been so weakened during the labour, as in this instance, and shows that the circulation of the heart was so weak, and the remains of uterine life so feeble, as to be unable to induce respiration. The heart may act, and in some creatures does act, many hours after it has been cut out of the body, and although the body is actually dead. For these reasons, I say that circulation of the heart is not alone a sufficient symptom of life, but there must also be the essential symptom of respiration which Dr. Freeman swears was absent in this case. As to the certainty that the child moved one minute after its birth, it has always been held that the fact of uterine life would not establish extra-uterine life, especially as in the cases of primiparous females the labour is frequently so severe that a child who is fully alive so far as uterine life is concerned is perfectly dead before its final expulsion from the mother. Secondly, as to there being no rigidity of the body, I should not expect to find rigidity of the body until after a considerable period had elapsed after death. Thirdly, as to the chest being arched, if this is meant to convey any symptom of respiration after birth, the description of the child cannot be correct, as, if the child respired after birth, Dr. Freeman must have observed some movement of its chest, which he swears he did not. If the chest was arched at birth, and no movement of the chest was observed, it must have been a case when the child endeavoured to respire before final expulsion from the womb."

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Dr. Freeman cross-examined.—"There were a variety of reasons, besides that of the funis having pulsated at the time I divided the child from the mother, which induced me to believe that the child was living. One reason was, the certainty that the child moved one minute before it was born; the great flexibility of every joint and part of the child, there not being the slightest rigidity; and the chest being fully developed and arched, which was a strong evidence of its having breathed. The arching of the chest is always considered evidence of the child having breathed; when the chest is flat, it is evidence that the child had not breathed. The child's chest was arched at its birth; I noticed no movement of the chest afterwards. There was a marked distinction in the child's countenance and appearance different to what it was when it was placed in the bath. I should not expect to see any change in a child that was dead-born, but I should in a child that was born alive. The countenance and pulsation in the funis was an indication that infant circulation was going on in the heart of the child. I consider pulsation one of the principal evidences of life. You could not have breath without circulation, neither could you have continued circulation without breath and without life. I never particularly noticed its breathing, but I had no doubt of its breathing—I mean after its birth. It is usual in practice to wait until the child has breathed, before the cord is divided. I have no doubt of the child's breathing, by my having followed my usual practice."

Dr. Ramsbotham, of No. 8, Portman Square, physician, deposed as follows:—

"I have read Dr. Freeman's evidence, and I have no hesitation in swearing positively that, if no other symptoms of life could be proved than those which had been mentioned by Dr. Freeman, the child must be pronounced to have been still-born. I have always, and still do, draw a great distinction between intra-uterine and extra-uterine

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life, and I do so for the following reasons:—When a child is born, if living, it enters on a new phase of existence. The commencement of the function of respiration is universally considered as heralding the entrance into life, and a child that has never breathed is said to be still-born. To constitute a live birth, then, the child must have respired; that is to say, it must have taken upon itself the performance of those functions which will allow it to exist independently of its mother. I cannot admit that a few feeble pulsations in the funis, or a twitch of the lips, or even the movement of a limb, would be sufficient to entitle it to be regarded as born alive."

In reply, an affidavit of Mr. Freeman was adduced, in which he denied that he had ever stated, as alleged by Dr. Lee, that there had been no respiration. What he had said was, that he had no doubt that the child had breathed after it had been separated from the mother.

Dr. Tyler Smith, of No. 7, Upper Grosvenor Street, physician, on behalf of the plaintiff, deposed as follows:—

"In my opinion the fact that pulsation was observed in the funis or umbilical cord after delivery is a physiological proof that the child in question was not born dead. The pulsation of the cord proves that the heart of the child was still beating, and the circulation, at least to some extent, going on. This is wholly incompatible with death. The child may at this time have been dying, but most certainly it was not dead. The action of the heart is at the foundation of all other acts of vitality. It has hence been called by physiologists, "Primum vivens, ultimum moriens." The remarks of Dr. Robert Lee on the contraction of the heart in the lower animals, as fishes and reptiles, after the removal of the organs from the body, do not fairly apply to the heart of the human infant. The human heart has never been seen to pulsate under like circumstances. Even in the cases referred to, the contraction of the heart is a proof

that vitality is not extinct. I do not consider it likely that Mr. Freeman was deceived as to the pulsation of the funis: the frequency of the beat of the fœtal heart is very different from the pulse of the accoucheur. Mr. Freeman speaks of it as a positive fact; and it is very common for the heart of a new-born infant to beat a short time after birth and then to cease. In giving a certificate of still-birth or otherwise, medical men or accoucheurs do not consider the question of whether the child is legally alive or dead at or after birth. If a child's heart should beat forcibly for many minutes, if it gasped and performed the movements of respiration again and again, yet if it died within a few minutes after birth, medical men would consider it as still-born, and certify accordingly. I believe there could be no question but that such a child would be considered as born alive; a distinction, therefore, must be made between the medical and legal ideas of still-birth and live birth. It is clear, from the cases cited in "Beck's Medical Jurisprudence" to which I have referred, that perfect respiration is not essential to legal life; and Mr. Chitty appears to depend more upon the circulation of which the heart is the centre than upon respiration for its establishment. It is for legal authorities to define the meaning of legal life; but physiologically there can be no question, that this child was not dead or beyond the chance of recovery as long as the heart continued beating. It was therefore alive at the moment of birth and subsequently, according to the testimony of Dr. Freeman. I submit that it would be much better to take as proof of live birth a single vital act, such as the beating of the heart after separation from the mother, which can hardly be mistaken, than an indefinite amount of respiratory action, which must always be doubtful and difficult of proof in cases where the child dies shortly after delivery."

Dr. Swain Taylor, in a letter addressed to Dr. Lee with reference to this case, dated the 27th of February

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last, referring to an old case of *Fish* v. *Palmer* (*a*), wrote as follows:—"Most of the writers differ from me, and think that the child should have been (in *Fish* v. *Palmer*) pronounced dead. But this depends upon what is considered to be real and absolute death. One fixes on the cessation of the action of the lungs, another of the heart, another of the muscular contractibility. I am of opinion that, in a case of this kind, we should not affirm that a child is dead in law until it is completely dead in a physiological sense and all vital actions have ceased."

Argument.

Mr. *Bacon* and Mr. *Karslake* for the plaintiffs.—This was a mere question of evidence, whether the child was born alive or dead. All the evidence proved that the child was born alive; for the affidavits adduced on behalf of the defendants were nothing more than opinion. None of the defendants' witnesses were present, or knew anything about the case further than was stated in the plaintiffs' evidence. Against this was the opinion of Dr. Tyler Smith. It was submitted, that the plaintiffs were entitled to the whole of Thomas Corral's share under his father's will.

[*Underwood* v. *Wing* (*b*) was cited.]

Mr. *Malins* and Mr. *Hardy* for the defendants.—The witnesses for the plaintiff depose to facts upon which the scientific knowledge of Drs. Lee and Ramsbotham entitled them to speak. The defendants did not dispute those facts, but they depended on the authority of the scientific evidence to show that they did not warrant the conclusion at which Dr. Freeman had arrived. Whether the child was born alive in a legal sense was a question of law, and not of fact. In Beck's "Medical Jurisprudence," p. 268, the rule was laid down thus: "There are two ways in which

(*a*) 1 Paris & Fonblanque, vol. i. 225; Smith's Forensic Medicine, 383; Beck's Med. J. 214, 7th ed.
(*b*) 4 De G. M. & G. 633.

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a child may be born alive. It may be born; the cord may be pulsating, showing that it is alive; and yet it may not respire. In this state it may continue for a sufficient length of time to die from natural causes, or, in consequence of criminal interference, before respiration has commenced. . . It must be evident, that when a child is born alive, but has not respired, its condition is frequently like that of the fœtus in utero. It lives merely because the fœtal circulation is still going on. In this case, none of the organs undergo any changes. The lungs remain as they are in the fœtus, and the organs circulating the blood are in the same state. If, therefore, it die before respiration commence, there are no changes which have taken place by which the fact of previous vitality could be established. This simple view shows how impossible it would be to prove that a child had been born alive independently of respiration."

[*Co. Litt.* 2 lib. 1, 629, 630 (*a*), was cited.]

THE VICE-CHANCELLOR:—

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The single question in this case is whether this child was born alive. The person most competent to speak upon the subject is Dr. Freeman, who attended as accoucheur at the birth, and who has given his evidence upon oath, three times over, so cautiously, yet so clearly, that he has established that this child was alive, and not dead, at the time when it was separated from its mother.

The affidavits on the other side are mere criticisms upon the sworn statement of Dr. Freeman; and, whatever may be the ingenuity of these criticisms, they show differences of opinion among medical men.

Dr. Lee and Dr. Ramsbotham are of opinion that, unless respiration, which is one of the vital functions, be proved to have taken place, there is no sufficient evidence that the child has been born alive. But Dr. Freeman, Dr. Taylor, and Dr. Tyler Smith, are of another opinion, and

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upon very sound grounds. Proof of pulsation and of action of the heart is much more easily obtained, and is a thing much more clearly a subject of evidence, than proof of respiration. The connection between circulation, of which pulsation is evidence, and respiration, is so extraordinary, as Dr. Freeman has stated, that even Dr. Lee and Dr. Ramsbotham do not affect to controvert that the functions of respiration and circulation must necessarily co-exist. But respiration is a thing that may exist and yet be extremely difficult of direct proof.

It has been clearly proved in this case that this child respired—that is, that there must have been respiration during parturition. The chest was arched. None of the medical gentlemen whose testimony is adverse to that of Dr. Freeman affect to say that an arched chest is not a clear proof that respiration has taken place. They only say that this child had performed the functions of respiration during the period of parturition. Where is the evidence that there was no respiration of any, the faintest or most imperceptible kind, after the separation of the funis? None of them venture to swear that there was no respiration. Dr. Freeman, who speaks with extreme caution, says that he observed no movement of the chest after the separation of the funis; but that he believed at the time of the birth, and still believes, that the child was alive, from the pulsation of the cord.

It is said that the pulsation referred to by Dr. Freeman was a pulsation in Dr. Freeman's thumb; but this is no more than a conjecture on the part of one of the witnesses, unsupported by any evidence.

In order to prove the existence of animal life, evidence of the performance of one clear vital function is enough. It is enough to prove pulsation in order to prove the existence of life; and I cannot adopt the view of Dr. Lee and Dr. Ramsbotham, whose theory is, that unless you have proof of the performance of three func-

tions essential to vitality you have no legal proof that vitality existed. They say that respiration, which is most difficult to prove, is a clear evidence of animal life. So it is. But they swear also, that, in the absence of clear evidence of respiration, clear evidence of pulsation and of animal motion is not to be taken as proof of the existence of animal life.

The view taken by Dr. Tyler Smith, in his affidavit, and which is in accordance with the opinion of Dr. Swain Taylor, mentioned by Dr. Lee, is much more consistent with the principles of just reasoning. Dr. Tyler Smith says, "It would be much better to take as proof of live birth a single vital act, such as the beating of the heart after separation from the mother, which can hardly be mistaken, than an undefinable amount of respiratory action, which must always be doubtful and difficult of proof in cases where the child dies shortly after delivery." Therefore, upon the whole evidence, I must hold, that it has been proved satisfactorily that this child was born alive and not dead.

On the question of costs, as the plaintiffs did not communicate to the defendants the name of the accoucheur who attended Mrs. Corral in her confinement, they are not entitled to their costs prior to the date of Dr. Freeman's first affidavit. On the other hand, as the defendants persisted in their claim after that evidence was before them, they ought to have only the costs incurred prior to that date. Let both such sets of costs be paid out of the whole fund.

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April 23rd, 24th, 25th, 26th, & 27th.

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Bill by a contractor, alleging unfair conduct on the part of the architect, whose decision was by the terms of the contract made final, and who ousted the contractor and finished the buildings. The Court, on proof of such unfair conduct, decreed payment of the balance due to the plaintiff on the contract, and relieved the contractor from penalties, declared the architect's decision not binding, and ordered both the defendants (the architect and the contracting party) to pay the costs of the suit.

THE bill in this case was filed by the plaintiff, a builder, against H. B. Turnbull and William Hey, an architect, and it prayed as follows:—

1st. That the defendant Turnbull may be decreed to pay to the plaintiff, with interest, the balance still due on the said 2590*l.*, and the value of the extra work (including, as extra, the work required by the plans and specifications above the quantities contained in the estimates), less the value of the work remaining to be executed on the 11th of February, 1859, but charging the defendant with the value of the building materials taken by him.

2nd. That, for the purpose aforesaid, the value of the extra works, and of the work to be done on the 12th of February, 1859, may be ascertained.

3rd. That, if necessary, the clause whereby the defendant William Hey is made sole arbitrator under the contract, may be declared not to form part of the contract or to be binding on the plaintiff, or that the contract may be set aside or rectified as far as respects such clause.

4th. That the plaintiff may be relieved from payment of the penalties claimed by the defendant, claimed as payable under the contract by reason of the non-completion of the works before the 30th of November, 1858.

5th. That the defendants, or one of them, may pay the costs of the suit.

The bill stated, that in July, 1858, the defendant William Hey, an architect, applied to the plaintiff, informing him that he was employed by the defendant Turnbull to erect four houses at Forest Hill, and asking the plaintiff to make a tender for the houses. The plaintiff at first declined to do so, but, on Hey pressing him, and

stating that he was a young man, and that it would help him, Hey, in his profession, sent in a tender.

The tender was made on estimates of the quantities supplied in writing by Hey, at the plaintiff's cost, who had not then been furnished with a copy of the plans or of the specifications. Hey represented to the plaintiff that he had had the quantities taken out full, meaning that the quantities of work to be executed in building the houses had not been understated; and on the faith of that representation the plaintiff agreed to tender, and did tender, for the building of the said houses at 2590*l.*, which tender, being the lowest, was accepted on the 29th day of July, 1858. The plaintiff was at this time absent from town, in consequence of inflammation of the eyes, when Hey telegraphed to him to come up and sign the contract. The plaintiff accordingly came to town, when Hey produced plans and a specification, which he wished the plaintiff to sign. The plaintiff wished to take the contract to show to his solicitor, but Hey assured him there was nothing objectionable in the contract, which was in the common form, and intimated that, unless it were signed, Turnbull would sue him on his tender. The plaintiff, in consequence of the state of his eyes, being unable to read, asked Hey what provision was made for disputes, and whether there was a proper clause for arbitration. Hey replied there was, and read over the clause, but omitted that part which constituted Hey the arbitrator. The plaintiff asked of the defendant if the plans and specifications which he wished him to sign were in accordance with the estimates of quantities on which he had made his tender, and the said William Hey assured him they were. Relying on this assurance and statement, the plaintiff signed the contract. The plaintiff was not furnished with a copy of the contract until September or October, 1858, when, in consequence of a dispute, he applied for a copy, and, after some delay, he

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obtained it, and found, to his surprise, the character of the arbitration clause.

The memorandum of agreement was as follows:—

"Memorandum of agreement made and entered into the day of , 1858, between H. B. Turnbull of the one part, hop merchant, and Charles Pawley, builder, of the other. Whereas, the said C. Pawley hath contracted and agreed with the said H. B. Turnbull to do and perform the several works in erecting four houses, together with the drains and appurtenances, at Forest Hill, in the county of Kent, agreeably to and in conformity with the plans and specifications, and subject to the conditions therein contained. Now, therefore, these presents witness, that for and in consideration of the sum of 2590*l.*, hereinafter agreed to be paid to the said C. Pawley, his executors, administrators, or assigns, he the said C. Pawley, for himself, his executors, administrators and assigns, doth hereby promise and agree to and with the said H. B. Turnbull, his executors and administrators, in the manner following (that is to say), that he the said C. Pawley, his executors, administrators, or assigns shall and will, in a good, proper, and workmanlike manner, with the best materials and labour of every kind, do and perform the several and respective works in erecting the said buildings, and agreeably to the plans or drawings and specifications hereinbefore referred to, and signed by both parties on or before the 30th day of November, 1858, subject and under the superintendence, and direction, and to the entire satisfaction of W. Hey, architect; and should any unsound, inferior, or improper materials or workmanship of any kind or nature whatsoever be introduced or used in the execution of the works referred to, the said W. Hey shall be at liberty to signify his disapprobation thereof to the said C. Pawley, his executors, administrators, or assigns, and to insist on having the same removed, and such work re-executed

with articles, materials, and workmanship as shall be fit and proper for that purpose; and in case default shall be made by the said C. Pawley, his executors, administrators, or assigns, in the performance of such requisition or direction, it shall and may be lawful to and for the said W. Hey, and full power and authority is hereby given and granted to him for that purpose, to set and employ any other workmen to take down, remove, and carry away such unsound and improper materials and workmanship, and to bring in, provide, fix up, or finish in the place or stead thereof, such other articles as shall be fit and proper, and agreeable to the true intent and meaning of these presents; and that the expense thereof so to be occasioned by the neglect or default of the said C. Pawley, his executors, administrators, or assigns, in the performance of the said agreements, shall be done and paid by him or them, and deducted out of the amount of the contract; and also, that it shall and may be lawful to and for the said H. B. Turnbull, or the said W. Hey, at any time during the course of carrying on the said works, to make any alterations, additions, or diminutions, in, to, from, or about the same, or any part thereof, in such way or manner as they shall think proper and convenient, and shall in writing order and direct. And the said C. Pawley, his executors, administrators, and assigns, shall and will abide by and perform every such order and direction; and in case the said extra works or alterations are likely and probable to take up a longer time to finish and complete the same than the 30th day of November, 1858, the same shall not in any wise vitiate or annul this contract, or render the same void in any respect, but an extension of time, at the rate of one day for every ten pounds' worth of work so altered or added, shall be made and allowed to the said C. Pawley, his executors, administrators, or assigns, in respect of the same. And if it shall happen that the said intended works, or any part

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thereof, together with such alterations, additions, or diminutions as may be made as aforesaid, are not completed and finished on or before the said 30th day of November, 1858, or within so many days after that date as the same shall amount to, the same being calculated at the rate of one day for every ten pounds' worth of work so altered, added to, or omitted as hereinbefore provided, that then and in such case he, the said C. Pawley, his executors, administrators and assigns, shall and will forfeit and pay to the said H. B. Turnbull, his executors or administrators, the sum of 10*l.* of lawful money of Great Britain for every week or part of a week the same may remain unfinished or incomplete, after the before-mentioned day or time herein specified. And the said C. Pawley for himself, his executors, or administrators or assigns, doth hereby consent and agree, that the said H. B. Turnbull, his executors or administrators, shall and may, and he and they are hereby authorized and empowered to stop and deduct the same out of and from the said contract-money; and in case the said C. Pawley, his executors, administrators, or assigns shall neglect or fail to completely finish the said works, together with the alterations as aforesaid, within the time herein provided, it shall and may be lawful for the said H. B. Turnbull, his executors or administrators, to set and employ a sufficient number of workmen, with all requisite materials and things, to complete the same, and shall and may retain the costs, charges, and expenses of so doing out of and from the said contract-money, or any other moneys that may be due from the said H. B. Turnbull, to the said C. Pawley. And further, that he the said C. Pawley, his executors, or administrators or assigns, shall and will, at his and their own proper costs, charges, and expenses, find and provide all scaffolding, implements, tools, tackle, and carriage, and every other matter and thing required to execute and perform the

conditions and agreements hereinbefore mentioned and contained. And the said H. B. Turnbull, for himself, his executors and administrators, doth hereby promise and agree to and with the said C. Pawley, his executors, administrators, and assigns in manner following (that is to say), that he the said C. Pawley, his executors, administrators or assigns, well and truly executing, performing, and fulfilling all and every the works herein mentioned in manner and within the time aforesaid, and observing, performing, fulfilling, and keeping all and singular the contracts and agreements herein mentioned and contained, he the said H. B. Turnbull, his executors or administrators, shall and will pay to the said C. Pawley, his executors, or administrators or assigns, the sum of 2,590*l.*, being the amount of the consideration of the within-named contract, the same to be paid by instalments as the works proceed, and at the rate of seventy-five per cent., and under the certificates of the said W. Hey, and the balance within two months after the same shall be certified by the said W. Hey to be completed to his satisfaction. And it is hereby mutually declared and agreed by and between both the said parties to these presents, that if any controversy, dispute, litigation, or doubt shall happen to arise between them, or their respective executors, administrators, or assigns, touching or concerning any contract or agreement herein contained, or the construction thereof, or anything respecting the said intended works, that then the said H. B. Turnbull and C. Pawley, their respective executors, administrators, and assigns shall and will submit (without delay) all such controversy, dispute, litigation, doubt, or question to the arbitrament, final end, and determination of the said W. Hey, who shall determine the same within one month after such misunderstanding or dispute shall arise, happen, or be made, and the award, order, or determination of the said W. Hey

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touching or concerning the matters to him referred, shall be binding and conclusive on all parties concerned; and all the said parties do hereby agree with each other to abide by, stand to, and perform and keep the same without any further dispute, litigation, or trouble. And it is hereby further agreed, that the said award, order, and determination shall be made a rule of Her Majesty's Court of Queen's Bench at Westminster, if the said Court shall so think fit."

The plaintiff signed the specification, at the foot of which was the following:—

"The contractor is to provide all labour, tools, scaffolding, carriage, water, and every other matter or thing which may be requisite; and is to perform the whole of the works in the very best manner, with the very best and most approved materials and labour of their respective kinds. He is, under the direction of and to the entire approbation of the architect, to provide, fix, and execute all works which are specified, represented, or implied in or by this specification, or in or by the drawings thereby referred to, or either of them, or which may be requisite for rendering every part of the buildings, works, and appurtenances complete, and to make good all damage caused by the execution thereof, without any extra charge of any kind thence arising and becoming due, except the amount of the consideration of the contract, and to be responsible for the stability and security of the works, or any damage that may occur to the same during their progress, and until the same are fully completed and finished and delivered up, and for the stability of the same for a period of three months after their completion. The contractor is also to provide, and keep upon the premises at all times during the progress of the works, a copy of the drawings and specification. The architect is to have power to order any alterations in the form of the structure, or of the finishings thereof, without vitiating the contract;

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and the difference of expense (if any) caused by such alterations so directed shall be calculated and determined by the aforesaid architect, and added to or deducted from the amount of the contract, as the case may be; and such calculation and determination by the architect, as aforesaid, shall be final and binding on both parties. The works to be commenced within one week after the contract has been signed, and to be fully completed and finished in every respect on or before the 30th day of November, 1858, under a penalty of 10*l.* per week for every week, or part of a week, the same may remain unfinished after that period, as ascertained and liquidated damages, and to be deducted from any money or moneys that may be due to the contractor in respect of the contract herein referred to, or in respect of any additional works therewith connected, or in respect of both the contract and additional works. No extra works will be allowed or paid for unless a written order for the same, signed by the architect, be produced. Should any additional works be ordered by the architect, the same shall be executed by the contractor, and an extension of time shall be allowed for the same, at the rate of one day for every ten pounds' worth of work so ordered and executed, but without prejudice to the above-named penalty. Should the contractor neglect or fail to carry out the intended works with sufficient speed in the opinion of the architect, or to complete the same within the time named, the architect shall have power to employ any other person or persons to carry out and complete the same; and the difference of expense (if any) shall be paid by the contractor in addition to the penalty above named. All materials brought on to the ground, and not objected to by the architect, shall immediately become the property of Mr. H. B. Turnbull."

The plaintiff was unable to get possession of the ground until the 1st of September; and but for such delay, and

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for the vexatious conduct on the part of the architect, as the bill alleged, he would have been able to complete the works by the 30th November, 1858.

The bill alleged, that the plaintiff executed the work in a workmanlike manner, and according to the plans and specification, except where altered by the defendant Hey, of the value of 2600*l.*, including extra work; but that the defendant Hey had only granted certificates to the amount of 1240*l.*, which is at the rate of less than 75*l.* per cent.; and the defendant Turnbull has only authorised payment to that amount, out of which has been deducted considerable sums.

The bill alleged, that by virtue of the clause constituting him sole arbitrator, the defendant Hey, by withholding the certificates, had prevented him from getting on with the works; that the plans and drawings were defective; and that the estimates of the quantities were defective.

On the 10th of January, 1859, the plaintiff's solicitors wrote to the defendant Turnbull, complaining of the arbitrary and unjust conduct of the architect, and proposing the removal of Hey as sole arbitrator, and the appointment of a surveyor on behalf of the plaintiff, with a provision for appointing an umpire in case of difference. The letter concluded by stating, that unless this course was adopted, the plaintiff would have no alternative but to apply to the court of equity. The defendant sent no reply to this letter.

On the 29th of January the plaintiff received from the defendant Hey the following letter:—

"6, West Square, Southwark—29th January, 1859.

"Mr. Pawley, Sir—Mr. Turnbull's house, Forest Hill—I am requested by Mr. Turnbull to give you notice that nearly two months have elapsed since the time named in the contract for the completion of the works;

and he is of opinion that, notwithstanding the fines which are accruing according to the terms of the contract, it is quite time the works were now complete. I am also desired to give you further notice, that unless the same are completed in every respect on or before the 10th day of February, 1859, recourse will be forthwith had to the powers of the contract, to employ additional men and provide additional materials to carry out and complete the same.—I am, Sir, your obedient servant,

"WM. HEY."

The 26th paragraph of the bill as follows:—

"The plaintiff replied to the said letter by requesting information as to where the doors in the basement and ground-floor passages were to be fixed, there being none shown in the drawings of the defendant William Hey, and also requesting a further certificate under the said contract; but the defendant William Hey continued to withhold a further certificate, and continued to object unreasonably to the work which was being done by the plaintiff; and under such circumstances the plaintiff applied to certain persons, Mr. Owen and Mr. Brine, who had supplied the plaintiff, in the way of trade, with materials for building the said houses, and requested them to see the defendant William Hey, and ascertain on what ground he objected to give a further certificate to the plaintiff, and whether he would consent to the said Messrs. Owen and Brine finishing the said houses on behalf of the plaintiff, in order that further dispute between the plaintiff and the defendant William Hey might be avoided. The said Messrs. Owen and Brine accordingly had an interview with the defendant William Hey, and he then made statements to them as to the said works very different from those he had previously made to the plaintiff; and, in particular, he gave them to understand that he had nothing in particular to complain of

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in the works done by the plaintiff, and that there only remained work to the amount of about 200*l.* to finish the said houses, and that the houses might be finished in a fortnight; and further, the defendant William Hey intimated to the said Messrs. Owen and Brine, or led them to believe, that if the works were continued he would give a further certificate on the then following Saturday, being the twelfth day of February."

The works were accordingly continued; but the defendant, instead of the certificate, sent the following letter:—

"6, West Square, Southwark—11th February, 1859.

"Sir.—I have to-day seen Mr. Turnbull relative to your proposition; Mr. Turnbull's intention is to employ additional workmen and provide the necessary materials according to the terms of the contract, and therefore cannot accept your offer.

"I am, Sir, your obedient servant,

"To Mr. Brine." "WM. HEY.

The 29th paragraph of the bill was as follows:—

"On the 14th of February, the defendant William Hey took possession of the works, and commenced making various alterations in the buildings which were entirely unnecessary, and were not required by or conformable to the said specification; and in fact, since the said 12th of February, the defendant William Hey has undone much of the work which had previously been completed according to his directions under the said contract; and, owing to this course of proceeding, the said houses remained unfinished until the month of September last, although at the time when the plaintiff discontinued the execution of the said works as aforesaid there was not more work remaining to be executed than might have been completed before the end of February last.

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On the 14th of February, when the defendant Hey took possession of the works, no more than 250*l.* was required to finish the buildings. In order to preserve evidence of the state of the buildings and quality of the works executed by him under the contract, he employed Mr. Meakin and Mr. Reddall, two able practical surveyors, and Mr. Badger, the district surveyor, to examine the works; and all of these gentlemen certified that the materials and workmanship were sound, and of good average quality, and in conformity with the specifications; and that they, in such case, would not feel justified in withholding the certificate.

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The plaintiff subsequently filed this bill.

An immense mass of evidence was adduced on both sides, a good deal of which was conflicting.

Mr. *Malins* and Mr. *Eddis*, on behalf of the plaintiff, contended, that the defendant Hey had, without the plaintiff's knowledge, improperly made himself arbitrator; that he had vexatiously and unfairly withheld his certificates; that he had, by his conduct, delayed the completion of the works, and then imposed penalties for the delay; that he had unreasonably found fault with a considerable part of the work, and compelled the plaintiff to make alterations, and even to do work not contained in the plans and specifications, by threatening to withhold the certificates; that he had unfairly taken possession of the works, and had gone to unjustifiable expenses in finishing the houses.

Argument.

In *Kemp* v. *Rose* (*a*), his Honour held that an opinion, though not a guarantee, given secretly to one of the contracting parties, that the work should not exceed a given sum, was sufficient to entitle the other party to relief in this Court.

Mr. *Baggallay* and Mr. *Fischer*, for the defendants,

(*a*) *Antè*, vol. 1. 258.

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contended, that Hey had authority to insert his own name as arbitrator; that he had done no more than his duty in compelling the plaintiff to perform his contract; that the work was badly and improperly done; and that it was the duty of the defendant to withhold the certificate. They denied the charges of vexatious conduct.

The evidence failed to prove any fraud or corrupt conduct on the part of the defendant Hey; and, even if he had made errors in judgment, that would not entitle the plaintiff to be relieved from his clear contract.

[*Scott* v. *The Corporation of Liverpool* (*a*) was cited.]

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THE VICE-CHANCELLOR:—

The plaintiff is a builder, who entered into a contract for building four houses for the defendant Turnbull for a specified sum. By the terms of that contract, as is usual in cases of the kind, an architect and surveyor—in this case the co-defendant Hey—was invested with extensive powers, and was to stand between the contractor and the defendant Turnbull, who was entitled to have the houses built in a proper manner, according to the contract. The position of the architect, in order to be just to both parties, required the exercise of great discretion and great fairness.

The plaintiff's case is, that Mr. Hey, the architect, exercised the powers conferred on him in an arbitrary, capricious, and vexatious way, so as to deprive him of the opportunity of completing the works according to the contract. He comes to this Court complaining of the conduct of both defendants, and he asks the opinion of the Court upon the manner in which Mr. Hey and Mr. Turnbull have conducted themselves towards him in this transaction.

There is no doubt about the jurisdiction of the Court in cases of this kind. If the plaintiff fails to prove a

(*a*) *Antè*, vol. 1, 216.

case of such grossly improper conduct on the part of the defendant Hey as to justify the interposition of this Court, his bill ought to be dismissed with costs; but, on the other hand, if, upon the evidence, the charges of improper conduct against Mr. Hey are proved, this Court cannot decline, in a transaction of this kind, the difficult office of endeavouring to do justice between the parties.

The difficulty in exercising this jurisdiction is, that this is not an ordinary case, where the Court can deal with the question as a familiar question of equity, or a single question arising on evidence, to be disposed of in the ordinary way. If the plaintiff is entitled to a decree in this case, the Court must take upon itself the office of a jury, and make a decree in the nature of the verdict of a jury, or of the award of an arbitrator; and it must decide the question at the hearing, or, if the circumstances render it necessary, direct inquiries to be made in chambers, and decide the question on grounds similar to those in which the verdict of a jury would be given, or the award of an arbitrator made.

In a case of this kind, it is impossible, as in ordinary cases, to arrive with perfect certainty at the amount which may be due to a person in the situation of the present plaintiff, if the Court should be of opinion that anything is due to him. The decree must proceed upon a principle of compensation—that is, on estimate of damage sustained—of work done, and upon evidence so conflicting and contradictory, that probably no two men would agree separately upon the exact sum to be awarded.

In all these cases, an arbitrator is obliged to discharge his duty as well as he can, having due regard to all the circumstances, upon the principle of damage and compensation, upon which it is impossible to arrive at perfect certainty as to amount. This it is that makes the diffi-

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culty in cases of this kind so great that, had they been fully foreseen by this Court before undertaking the decision of such questions, it might have been possibly found more convenient not to assume such jurisdiction.

But, on the other hand, there would be great difficulty in declining the jurisdiction; because courts of law feel so unable to deal with such questions, that they are almost invariably sent out of court and referred to an arbitrator. A forum of that kind is perhaps more convenient than a discussion in a public court of justice, where the examination of the evidence must involve questions of minute and difficult detail.

In the present case the evidence has been fully considered, and fully and ably commented upon by counsel on both sides; and upon the result of that evidence I come to the conclusion, without any doubt remaining on my mind, that the plaintiff was not fairly treated; and, without imputing fraud to the defendants, it is proved by the evidence of at least five credible witnesses, whose testimony cannot be impeached, that the conduct of the defendant Hey was not of that discreet, impartial, and fair description which it ought to have been.

Up to the 10th of February the works were proceeded with by the plaintiff. On the 14th of February the powers of the contract were exercised by Mr. Hey, and the plaintiff was ousted from the works. For the moment I pass over the detail of his complaint during the progress of the works; and taking the matter as it stood at a time when the difference between the plaintiff and the defendant Mr. Hey had reached the point that he resolved to oust the defendant from the works, what was the conduct of the parties? The course pursued by the plaintiff was eminently fair and discreet. What the defendant Hey did was a departure from his duty both to the defendant Mr. Turnbull and to the plaintiff.

The plaintiff, finding that he was about to be ousted

from the work, and would not be permitted to finish the buildings, called in two surveyors of unchallengeable reputation, whose evidence is before the Court in the clearest terms, and whom the defendants have not even attempted to cross-examine. The plaintiff says that, feeling he had done the work properly up to that point, he was determined to have unprejudiced evidence of the then state of the work by surveyors of unquestionable reputation; he told the defendants his intention, and desired them to meet him and his surveyors upon the works. The thing to be ascertained was—how much, and in what manner, the work had been done, as to the quality of the work and the material, and how much time and money would be required to complete the houses.

Upon these points the attention of both parties had been turned to the survey to be made by Mr. Reddall and Mr. Meakin. The defendants declined to have any communication with the surveyors; and the defendant Hey, in his cross-examination, speaks thus: "When the plaintiff abandoned the work I did not make any detailed account or memorandum in writing of what remained to be done." Could there be a more gross neglect of duty than this? He was going to take possession of the work adversely to the plaintiff, and he abstains from making any detailed examination or memorandum of the then state of it. Then he proceeds: "I cannot at all state what proportion of the 1200*l.* or 1300*l.* would have been required for the alteration, or what for the completion. Mr. Turnbull had to make the alteration before he could complete the houses."

It is needless to go further to see that the plaintiff pursued a straightforward and honest course, and that the course pursued by the defendant Hey was eminently improper. He made no detailed examination, and he did not take the trouble of calculating how much it would cost.

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It is proved by the evidence, that in the preceding month of January the plaintiff, considering he was unfairly dealt by, complained to Mr. Owen, his timber merchant, and to Mr. Brine, a person who had contracted to supply him with stone or other building material. These two persons, a month before the plaintiff was ousted, crediting his statement, and considering the matter, without concert with the plaintiff resolved to have an interview with Mr. Hey and ascertain what the position of matters really was. Both these gentlemen, who are impartial witnesses, swear in the clearest and most distinct terms, that Hey said that two or three weeks more would complete the works, and that it would not take much more than 200*l.* of expenditure to complete them. This the defendant Hey denies. But, upon the weight of evidence, looking at the strong impression the interview must have made upon their minds, and the clearness of their statements on cross-examination, it is impossible not to hold that statement proved. The defendant Hey is also cross-examined; he denies that he said that it would only take 200*l.* to complete the work; or that it would only take a fortnight. Upon recollection, he says that one of these persons, during the interview, said that the plaintiff had said that it would take only about 200*l.* What did he reply to that? He said he would not enter into particulars. The whole object of the interview was to enter into particulars, to see whether the houses could be properly built, so that Mr. Turnbull, when he paid the money according to the contract, should be put into possession of the houses built according to the contract. I refer to those two occasions on which Mr. Hey gives an account of his own conduct, as showing that, upon the most favourable construction of his conduct, taking his own account of it, it was not that fair, discreet, and proper conduct which a man in his position should have exercised upon that occasion. As to the rest, there is an abundance of evidence

on the part of the plaintiff to show that the work was well done.

That the state of the work was such as to require 1264*l.* to be paid in order to complete the work, is a view of the case that cannot be adopted. I must therefore come to the conclusion, that the plaintiff has established against Mr. Hey, and through Mr. Hey against Mr. Turnbull, a clear case of unfair and oppressive conduct; and, if that be so, the only question that remains is that extremely difficult question to which I have adverted, as to the form of the decree.

Mr. Craig has truly said, that there are precedents in this Court for directing an account of what work has been done, and how much is due in respect of work done. That is true; but such precedents do not afford a very favourable impression of the ultimate justice produced by a decree of that kind. One of the chief clerks in my chambers has been occupied for more than five years in taking an account of that kind, in which vast works were done to the extent of nearly half a million sterling (*a*). With the experience of that case, I find that, upon the various points of detail in the work, the question to be adjudicated upon and decided upon almost every item is, in fact, neither more nor less than what ought to be decided by a verdict of a jury upon the *quantum meruit*, or for work and labour done and material supplied.

In this case, there are the means of arriving at a conclusion without exposing either the plaintiff or defendants to the embarrassment and uncertainty of the result of directing a complicated account or an inquiry in chambers. I do not know whether it is possible to avoid an inquiry upon one particular point; but upon the whole there are in this case, as materials for measuring the relief to which the plaintiff is entitled, some things which are quite clear. The contract price is certain. The plaintiff bound himself to

(*a*) *McIntosh* v. *The Great Western Railway.*

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complete the works in question for a definite sum of 2590*l.* The right of the defendant Turnbull, when he paid that sum, was to have the houses properly finished and built according to the contract. It is also sufficiently certain by the evidence what was the state of the works at the time when they were taken out of the hands of the plaintiff. Mr. Hey says: "That the utmost expenditure of the plaintiff at one particular time was 1400*l.*, but that that must be cut down, because there were materials improper, and other works and alterations which were necessary, which would make it less, but not make it less with a view to the expenditure of the plaintiff." Looking at the evidence of all the witnesses, it is reasonably certain that between 200*l.* and 300*l.* would have finished the buildings according to the contract; therefore, what the plaintiff is clearly entitled to is, the amount of the contract price, deducting the 200*l.* or 300*l.* The defendant Hey, in finishing the houses, has expended 1264*l.*, and claimed to deduct that amount from the contract. Upon the weight of evidence on both sides, I have come to the conclusion that there is evidence of the most wanton expenditure and unfair conduct on the part of Hey in the completion of the buildings. Part of the evidence of the defendants is, that so badly was the work done, that there was a mantel-piece which was stuffed with brown paper, and instead of being properly fixed in cement, it was put up with brown paper. But that is disproved. It is needless to go into the evidence in detail, because it is proved that between 200*l.* and 300*l.* would have completed the buildings at that time; but if the defendants insist on it, I cannot refuse them an inquiry on this point. Upon the whole case, the proper decree will be to declare that—"It appearing from the evidence that the defendant Hey acted improperly and unfairly in the exercise of the powers conferred upon him by the contract in the pleadings mentioned, declare that the plaintiff is entitled to

recover from the defendant Turnbull the full amount of 2590*l.* for the contract price, and the sum of 190*l.* for extra work." That extra work was done is proved by the defendants themselves; but there is a counter claim for penalties. Now the plaintiff's case is, that much more than 190*l.* worth of extra work was done. The defendants endeavour to make out a case of penalties, which, however, is not sustainable in the present state of the evidence, nor can it properly be the subject of an inquiry. Upon the principle of estimate, and desiring to save the parties the vexation and expense of more accounts and inquiries than are actually necessary, I must hold that the defendants are entitled to deduct nothing for penalties, and that the purposes of justice will be sufficiently answered by allowing the plaintiff 190*l.* for extra work. There must, therefore, be a declaration that the plaintiff is to be allowed the contract price and the sum of 190*l.* for extra work, after deducting the sum of 1420*l.* already received, and subject to the deduction of such sum as would, on the 11th of February, 1859, have been justly and fairly expended for properly finishing the buildings and works according to the contract. If the defendants insist on a further inquiry, it should be whether the sum of 248*l.*, or any and what larger sum, is proper to be allowed to the defendant Turnbull in respect of the amount necessary for completing the buildings and works after the 10th of February, 1859. It is true that, in the case of *Ranger* v. *The Great Western Railway Company* (*a*), the form of the decree, advisedly made, was to inquire what amount had been properly expended by the defendants in completing the works after they had taken possession of them out of the hands of the contractor. But an inquiry of that kind would be a great miscarriage in a case like this. The works, the conduct of the parties, and the situation of the subject-matter of the contract, were

(*a*) 3 Rail. Cas. 298.

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entirely different from those of the present case. Such an inquiry would inflict an immense amount of expense upon all the parties; and to put it in the form of an inquiry what sums had been properly expended by the defendants in the completion of the works would lead to no satisfactory result. But, although that is my opinion, it might not be the view taken by another judge; nor, in a case of this kind, so eminently depending upon the discretion of the Court, could justice be done better by directing the inquiry in any other form. If the defendants succeed in proving that more than 248*l.* was expended, and properly expended, then, of course, that larger sum will be deducted from the gross amount of the two sums I have stated. Therefore, taking the account on that footing, what will remain to be done will be, "to certify how much remains due to the plaintiff from the defendant Turnbull, having regard to the aforesaid declaration, and the result of the aforesaid inquiry, and including interest at 4 per cent. from the 1st of May, 1859." I have fixed upon that period —because, although much more time was consumed in finishing the works, yet, upon the evidence, it is clear the work might have been then completed—if not all the alterations proposed by the defendants—and the amount under the contract ought to have been paid at that date. For that reason I fix upon the date of the 1st of May. Then there will be a decree for payment of what shall be certified to be due upon the chief clerk's certificate. There must be a direction to tax the costs of the plaintiff up to and including the hearing (excluding the costs of the affidavit made by Mr. Summers for the plaintiff); and order both defendants to pay those costs. Further consideration will not be reserved, because that would be an unnecessary expense. There must be liberty to apply.

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April 20th & 22nd.

The plaintiff insured his ship by becoming a member of an association for marine assurance, and signed an undertaking to be bound by the rules of the association; but, although he applied for a copy of the rules, he was not furnished with one; and, although he mentioned that his ship was mortgaged, he was not told that there was a rule that no member should recover any money on his insurance whose ship was mortgaged, unless the mortgagee had, previously to the loss, covenanted by deed to pay all sums which might become due from the mortgagor to the association. Demurrer to the bill filed alleging the loss, and to recover the sum insured, on the ground that the mortgagee had not executed such a deed—*Over-ruled.*

THIS was a demurrer for want of equity.

The bill alleged that, on the 1st of March, 1859, the plaintiff purchased of Messrs. England a British vessel called the *Beatrice*, and on the same occasion executed a mortgage to the vendors, to secure 400*l.*, being part of the purchase-money.

The bill alleged that, on the 9th of the same month, he proceeded from Sunderland to London, to take possession of the vessel, and on the 11th of March, 1859, called at St. Benet's Place, Gracechurch Street, at the office of the London Marine Association, where he saw Mr. J. Henzell, the secretary, to whom he stated he wished to insure the *Beatrice* for 800*l.*, viz. 500*l.* with the society, and 300*l.* elsewhere. The bill stated, that Mr. Henzell filled up a printed form of proposal for 500*l.* for an insurance with that association, and promised to manage to insure her for the other sum, viz. 300*l.*, with the London Maritime Association, and after inquiring where the ship was lying, said that he would send a surveyor to look at her. Mr. Henzell then altered one of the printed forms of proposal of the Marine Association, so as to make it applicable to the Maritime Association, and the plaintiff, at his request, also signed and left with him such altered proposal. This altered proposal was headed with the name of the London Maritime Assurance Association, and addressed to the manager thereof, and then proceeded as follows:—

"I, the undersigned, William Turnbull, of Sunderland, do hereby authorise and empower you to insure in the London Maritime Assurance Association the sum of

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300*l.* on the ship *Beatrice*, of the port of Sunderland, Captain Turnbull, registered 278 tons, and warrant to be classed , in Lloyd's register-book, and I hereby acknowledge myself to be a member of the said association, under and subject to the rules and regulations thereof; and I authorize you, or any three members of the committee, for me or in my name, as such member, also to sign and underwrite all policies of assurance upon all ships that may from time to time be approved of by the committee of the said association, in such sums respectively as they may think proper; and I undertake to accept and to pay all drafts for losses and contributions that shall be drawn, made, or ordered to be paid by the said committee; and I also undertake to abide by the rules and regulations of the said association in every respect. Risk to commence on the 19th day of March, on which day the ship is warranted safe at .

"Built at Isle of Man in the year 1829 — How fastened? Copper fastened—When last sheathed? ."

Among the rules of the London Maritime Society were the following:—

"1. That the members of this association shall severally and respectively, &c., insure each other's ships or shares of ships from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses perils, damages of whatever nature or kind soever which may be sustained or received by their respective ships, &c.

"2. That the committee for managing the affairs of this association do consist of not fewer than five or more than nine members, any three members of the committee to be empowered to act for and on behalf of the whole committee. That the following persons be and do constitute the committee, viz., Messrs. George John Woolfe, William Errington Bell, George Waters Sweeting, John Brodie, Thomas Samuel Woolfe, Robert R. Glover, and Leonard Chatt.

"5. That each member, on entering any vessel in this association, shall pay annually 6*s.* per cent. on the sum insured, policy duty and power of attorney; and when the policy shall be within two months of expiring, 3*s.* per cent.

"14. That if any one or more of the members of this association shall lose his or their ship or ships, he or they shall be subject or liable to any loss that may happen to any of the other ships insured in this association, for or in respect of such ship or ships by him or them lost, for forty-eight hours after such loss; nevertheless, all ships lost shall contribute at least three months from the date of their entry into the association, but shall not contribute to any vessel which shall have been entered subsequent to such loss; and the committee shall be empowered to retain in their hands such proportion of the amount payable to such person in respect of his or their ship or ships lost or claim for average not exceeding ten per cent. on the amount insured, to meet his or her contribution to any loss or losses which may happen to any other ship or ships so insured.

"18. That no member, the whole or any part of whose share in a ship insured in this association shall at the time of entering, or afterwards, be mortgaged or assigned to any person or persons for any debt or debts, shall have any claim by virtue of this policy, nor shall any assignee of such policy have such claim for any loss or damage which may be sustained by such ship, unless previous to the happening of such loss or damage, such member, mortgagee, or assignee, shall have delivered to the manager a deed of the mortgagee or assignee, whereby he shall covenant with the manager to pay and discharge all sums of money which now are, or may thereafter become due from such member, in respect of such ship and of her being insured, and of the insurances underwritten on his behalf in this association as owner thereof; nevertheless such member shall still be liable for, and shall pay his

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contribution and demands the same as if such mortgage or assignment had not been made.

"26. That if any dispute or difference should arise between the committee and any suffering member relative to the settling of any loss or damage, or to a claim for average, or to any other matter relating to his insurance, the matter out of which such dispute or difference shall arise shall be referred, either generally or specifically, at the option of the committee, to the arbitration of two disinterested persons, and a third to be appointed as hereinafter mentioned. And it is hereby expressly agreed and declared, that the obtaining the decision of such arbitrators on the matters and claims in dispute in one of the modes hereinafter mentioned, shall be a condition precedent to the right of any member to maintain any action or suit on his policy, and then only for the amount so awarded. Provided always, that if the committee shall be willing to refer all matters in dispute generally, the agreement of submission shall be in the form contained in schedule A to those rules or to the like effect; but if the committee shall dispute the claim of any such member solely or principally on the ground that he has not complied with the rules of this association, then and in such case it shall be the duty of the committee to estimate the amount payable by the association to the claimant, on the assumption that he has complied with the rules, and to refer solely and specifically the question of the compliance or non-compliance by the claimant of the particular rules of the association relating to which the dispute shall have arisen, and in such case the agreement of submission shall be in the form contained in schedule B appended to those rules, or to the like effect."

On the 14th of March, 1859, the plaintiff called at the office of the London Marine Association, for the purpose of ascertaining whether his proposal had been accepted, and on that occasion saw Mr. Henzell and also Mr. Woolfe,

the secretary and manager of the London Maritime Association, who was also one of the committee of management of the London Marine.

Some conversation then took place between the plaintiff and these gentlemen, in the course of which the plaintiff alleged that he informed both of them that 400*l.* of the purchase-money was unpaid, and a charge on the vessel. The plaintiff alleged that Mr. Henzell then said, "Then Mr. England will be your mortgagee," or words to that effect. The plaintiff replied that he was. The plaintiff alleged that Mr. Henzell, from his conversation with Mr. G. J. Woolfe, appeared to know the former owners of the ship. Mr. Henzell then said that he would write to Mr. England for a guarantee, and Mr. G. J. Woolfe stated that that would do. The plaintiff then asked for copies of the rules of the said associations, when Henzell and Woolfe replied, that they had not got copies then, but would forward them to the plaintiff, which, however, the plaintiff alleged they never did, and the plaintiff remained ignorant of the contents of the rules of the said associations until after the loss of the said ship.

After the insurance was effected, the plaintiff took the vessel to Sunderland, whence she sailed to Spain, and afterwards to Quebec. On the 3rd of September, 1859, she sailed for England, and was lost at sea on the 24th day of September; but the plaintiff and the crew, except one man, were saved by a French brig.

The bill alleged that, on the 26th of October, both Mr. England, the mortgagee, and the plaintiff, wrote to the secretary of the London Maritime Association, informing him of the loss of the ship, and requesting payment of the insurance monies. In reply to this letter Mr. Woolfe wrote to the plaintiff, directing his attention to the 18th rule of the association, and enclosing a copy of the rules. In reply to such letter the plaintiff wrote as follows:—

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Statement.

"Sunderland, November 2nd, 1859.

"Sir,—When I insured the ship, I asked Mr. Henzell for the rules of the clubs. He told me there were none left, but as soon as they were printed they should be sent. I did not know that such a rule existed as the 18th section. There is an average bill due on the 4th for 2*l.* 14*s.*, and my claim on you is 300*l.*, and until I get some insurance I have not one penny to meet anything that comes against me. I was taken off the wreck without a jacket on my back until they put one on when I got on board the French brig. If you pay the insurance, Mr. England will pay the averages.

"Yours respectfully,

"WM. TURNBULL."

Mr. Woolfe, in reply, wrote to the plaintiff, returning the draft, and informing him that, if the claim was admitted, the averages could be deducted, and if not, that he would not be required to pay them.

The plaintiff subsequently received the following letter:—

"London Maritime Assurance Association,

"29, Threadneedle Street,

"December 3rd, 1860.

"Mr. William Turnbull,—Sir, I am directed by the committee to inform you that they have rejected your claim for the sum of 300*l.* for loss in respect of the ship *Beatrice*, on the ground of your non-compliance with the 18th rule of the association. I am further directed to inform you that the committee are willing to refer the question of compliance or non-compliance to arbitration, according to the terms of the agreement contained in schedule B to the printed rules; and assuming that you have complied with the said rule, the committee estimate your claim at 300*l.*, otherwise at *nil.*

"I am, Sir, yours truly, *p. pro.* G. J. Woolfe,

"J. WOOLFE."

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The plaintiff, on the 28th of February, 1861, filed this bill, alleging that he had never had a copy of the rules of the association until they were sent by Mr. Woolfe.

The bill charged, that the London Maritime Association were not, under the circumstances therein mentioned, entitled to refuse to pay the said insurance-money under the 18th of the said rules, or at all; and that, although the plaintiff had not, under the circumstances therein mentioned, complied with such 18th rule, he was, in equity, under the circumstances therein mentioned, absolved from compliance therewith; and the defendants had waived the compliance with such rule.

The bill prayed, that it might be declared that the plaintiff was entitled to be paid, out of the monies and property of the London Maritime Assurance Association, or by the contribution of the members of the said association, in accordance with the said rules, the balance of the said sum of 300*l.*, after deducting the several payments which the plaintiff, as one of the members of the said association, was bound to make in respect of averages and losses of ships of other members of the said association; and that the defendants, other than the mortgagees, might be decreed to pay the amount of such balance to the defendants the mortgagees (the plaintiff consenting thereto), out of the monies and property of the said association, or to draw bills, and otherwise to procure the contribution of the members for the purpose, according to the customary mode of payment in use by the said association.

That the defendants, other than the mortgagees, might pay the costs of the suit.

The bill alleged, that the members of the association exceeded one hundred in number.

The defendants demurred for want of equity; and for further cause showed that, although it appeared by the bill that the plaintiff was, and claimed the relief sought thereby as,

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an insured and suffering member of the association therein mentioned, and called the London Maritime Assurance Association, he was bound by the rules of the said association, which were set forth in the bill; and that by one of such rules, provision was made for the reference to arbitration in manner therein provided, of any dispute or difference which should arise relative to the settling of any loss or damage, or to a claim for average, or to any other matter relating to the insurance of any suffering member; and that, by such rule it was expressly declared that the obtaining the decision of such arbitrators as therein provided should be a condition precedent to the right of any member to maintain any action or suit on his policy; nevertheless, the plaintiff did not by his bill show or allege that he had obtained, or endeavoured to obtain, or been in any manner prevented or hindered by the defendants or otherwise from obtaining, the decision of arbitrators as provided by the said rule, or had in anywise proceeded or consented to refer his claim to arbitration as thereby provided; and for further cause the defendants showed that the bill was defective for want of proper parties to the bill, and that the members of the association mentioned therein, and called the London Maritime Assurance, were not parties thereto; and that there was not or were not any person or persons party or parties thereto who were, or by the bill were alleged or stated to be, a member or members of the said association; and that it appeared by the bill that all those defendants were members of and constituted the directors and committee of such association.

Argument.

Mr. *Bacon* and Mr. *Beaumont*, for the demurrer.

It was not denied that the plaintiff had agreed to abide by the rules of the society. That was a term in the contract; but, if so, the 18th rule was fatal to his claim. This bill was, in fact, a bill to vary the terms of the contract, on

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the faith of which the defendants had alone agreed to effect the insurance. It might be, that in cases of fraud or mistake, a plaintiff might be entitled to be relieved against his deliberate contract; but no such case was made by the bill.

It could not be said, that the 18th rule was illegal, because it was expressly framed to avoid the objection in *Hutchinson* v. *Wright* (*a*); in truth, without such rule, it would be impossible to conduct the business of the association.

On the ground, that the plaintiff was precluded by the arbitration clause from maintaining this suit, the defendant relied on *Scott* v. *Avery* (*b*).

[On the question of parties, they cited *Richardson* v. *Larpent* (*c*), and *Dodgson's case* (*d*).]

[The Merchant Shipping Act, 1854, 17 & 18 Vic c. 104, ss. 45, 55, 67—73, 100, 107 was also cited.]

Mr. *Malins* and Mr. *Southgate* appeared for the bill, but were not heard.

THE VICE-CHANCELLOR:—

Judgment.

The first ground of defence rests upon the construction of a deed or instrument, set out in the bill, which contains a stipulation, that unless a certain thing is done by the plaintiff, he is not to be at liberty to sue upon the assurance which he supposed he was effecting by his dealing with the defendants.

The bill states that, when the plaintiff paid his money and entered into the contract, he was not told of any such stipulation; and that he stated to the defendant that he had not paid the purchase-money of the ship—in other words, that, within the meaning of the Merchant Shipping Act,

(*a*) 25 Beav. 444.
(*b*) 5 Ho. Lds. Ca. 811.
(*c*) 2 Y. & C. C. C.
(*d*) 3 De G. & Sm. 85.

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there was a mortgage, the existence of which would have brought his case within that stipulation of the existence of which he was ignorant. It may be doubted whether, if the plaintiff had had notice of this stipulation, and had failed to comply with it before the loss had accrued, he would not have been entitled to recover.

The object of the stipulation and essence of the contract is to secure to the society the right of contribution from the mortgagee. But it is another thing to say, that the words, which import that no claim shall be made against the society, are to be construed as amounting, in the event of non-compliance with the terms of the stipulation, to an entire forfeiture of the contract.

Upon the statements in the bill, it appears that there was no constructive notice to the plaintiff that there was any such stipulation at all in the rules of the society. There certainly was no actual notice, and the rules of the society, although the plaintiff asked to have a copy of them, and was promised to have a copy sent to him, never were sent to him, and no notice of the rule in question was given to him. The demurrer must be overruled with costs.

MARE *v.* WARNER.

April 30th.

Where a bankrupt trader compounded with his general creditors for 4*s.* in the pound, but gave, as security to one creditor, his I O U for the whole debt, in order to induce him to concur in annulling the bankruptcy, and afterwards, in consideration of a loan, exchanged the I O U for bills which he accepted, the Court, at the suit of the trader, declared the bills invalid, but without costs.

THE bill in this case, was filed for the purpose of obtaining an injunction, to restrain the defendant from further prosecuting an action at law, which he had commenced against the plaintiff, on three bills of exchange,

accepted by the plaintiff; and also for a declaration, that the said bills were invalid, and ought to be delivered up to be cancelled; and that the defendant might be decreed to take up the promissory note for 115*l.*, and to indemnify the plaintiff in respect thereof.

On the 8th of May, 1860, the action was restrained by injunction.

The facts of the case, which, in many respects, were similar to those which existed in *Mare* v. *Sandford* (*a*), were briefly these:—In September, 1855, the plaintiff, a shipbuilder, at Millwall, was adjudicated a bankrupt. The defendant, a creditor, proved for the sum of 836*l.* 10*s.* The plaintiff, after his bankruptcy, commenced negotiations with his creditors for the purpose of annulling the adjudication, by means of the pecuniary assistance of Mr. Rolt, his father-in-law. He first proposed a composition of 10*s.* in the pound, but finding that his estate would produce less than he had anticipated, fresh negotiations were entered upon for the payment of a composition of 5*s.* in the pound; and ultimately the plaintiff arranged with his creditors on payment of 4*s.* in the pound.

A part of the arrangement proposed was, that, on payment of 5*s.* in the pound, certain of the creditors should assign their debts to Mr. Quilter.

The bill alleged, that the defendant, in respect of the said debt, refused to accept the said composition of 5*s.* in the pound, except upon the terms of having the residue of the debt secured to him; and thereupon it was arranged between the plaintiff and the defendant (the plaintiff not being aware that his so doing would be an offence against the bankrupt laws) that the plaintiff should give the defendant his I O U for the sum of 836*l.* 10*s.* 2*d.*, and should, upon the request of the

(*a*) See *antè*, vol. 1, 290.

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defendant, accept bills of exchange for that amount, the defendant undertaking to account for the composition of 5*s.* in the pound on his said debt; and, accordingly, on the 15th March, 1856, an agreement was entered into between Arthur Warner, of the one part, and William Quilter, of the other part, whereby, after reciting that the defendant was a creditor of the plaintiff, and had proved a debt of 836*l.* 10*s.* 2*d.* on two bills of exchange under the bankruptcy, and the said Warner had agreed to sell, and the said Quilter to purchase, the said debt, it was thereby witnessed, in consideration of the sum of 209*l.* 2*s.* 6*d.* paid to the said Warner by the said Quilter, he, the said Warner, transferred and assigned to the said Quilter all the said debts, &c. There was also a covenant for title.

On the same day, the plaintiff gave to the defendant his I O U for the sum of 836*l.*

In pursuance of the arrangement above mentioned, the defendant drew upon the plaintiff, in the name of "C. J. Mare and Co." a bill of exchange dated 21st of May, 1859, for 300*l.*, payable at four months; another for 300*l.* dated the 27th of May, 1859, payable at four months; and a third, for 236*l.* 10*s.* 2*d.*, payable at four months. The bills were accepted by the plaintiff, in the name of "C. Mare and Co.," and were delivered by the plaintiff to the defendant, whereupon the defendant delivered up to the plaintiff his I O U for 836*l.* 10*s.* 2*d.*

The bill for 236*l.* 10*s.* 2*d.* was indorsed over by the defendant to Messrs. Neild and others, who, on the 30th of November, 1859, commenced an action thereon and recovered judgment, the plaintiff not having appeared; and on the 9th of January, 1860, the plaintiff settled the action with the defendants, by paying them 100*l.* in cash, and by giving them his promissory note, dated the 20th of January, 1860, for the payment of 151*l.* 6*s.* 1*d.* three months after date.

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On the 23rd of April, 1857, a dividend of 1*s.* 6*d.* in the pound was decreed under the bankruptcy. On the 7th of July, 1857, the plaintiff, and Mr. Rolt, as his friend, made an offer of composition at the rate of 4*s.* in the pound, including the said declared dividend of 1*s.* 6*d.* The offer was accepted by nine-tenths in number and value of the creditors assembled, and, after further proceedings, in the course of which a second dividend of 2*s.* 6*d.* in the pound was declared on the 26th of November, 1857, the bankruptcy was annulled, by an order made on the 24th of December, 1857.

The defendant stated that, on the 27th of May, 1859, the plaintiff called on him and asked him for a loan of 100*l.*, and produced a letter from his solicitors, Messrs. Nichols & Clark, which was as follows:—

"9, Cook's Court, Lincoln's Inn, May 27th, 1859.
"Arthur Warner, Esq.

"Sir,—Our client, Mr. C. J. Mare, has requested us to write to you. He informs us that you are under the impression that he was arrested last week, and he wishes to remove that impression. It is true that an execution was issued against him at the suit of Messrs. Sandford, upon a judgment they had obtained against him on a bill of exchange, given to them as a security for 5*s.* in the pound on the debt proved by them under the bankruptcy, in addition to the 5*s.* in the pound for which they had sold their debt. We advised Mr. Mare that they had obtained the bill from him under circumstances which a court of equity would not uphold, and which, in justice to himself and his *bonâ fide* creditors, ought not to be upheld, and so informed Messrs. Sandford's solicitors, and that, unless they withdrew the execution, we should apply to the Court of Chancery for an injunction to restrain them from acting upon it, which we did; and yesterday the case was argued, and the injunction unhesitatingly con-

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tinued (*a*), thus confirming the view we had advised him the Court would take of these transactions.

"Your obedient servants,

"NICHOLS & CLARK."

The defendant alleged that, when he had read the letter, the plaintiff said to him: "You see how this affair of old claims is settled; you, therefore, with others, can have no legal demand upon me: but for you who have assisted me so much in my difficulties, I desire to show, in the face of this letter, what are my feelings towards you. If you will draw upon me for 836*l.* 10*s.* 2*d.*, the amount of the I O U which I have given you, I will accept; but it must be on the understanding that, should I require it, the bill shall be renewed to the extent of twelve months, and as I have thus shown my willingness to do all I can, you must now assist me for present emergencies." The defendant, as he alleged, agreed to this arrangement, and the plaintiff then pressed him to let him have the further sum of 100*l.*, to which he consented on the terms mentioned in the answer, and the plaintiff gave him his note for the amount.

The three bills were thereupon drawn and accepted as above stated. Upon their being accepted, the defendant, at the plaintiff's request, wrote to the plaintiff a letter undertaking to return 209*l.* 2*s.* 6*d.*, when all defendant's acceptances, and a draft of the plaintiff's should have been paid. Defendant also, by another letter, agreed to renew the acceptances for twelve months.

The defendant further stated, that he and the plaintiff had had considerable business transactions together, and that when the plaintiff was negotiating an arrangement with his creditors, the defendant was throughout most anxious to assist him. He said that the statement, that

(*a*) See *Mare* v. *Sandford*, 1 Giff. 288.

he refused to accept the composition of 5*s.* in the pound, was wholly untrue.

He further stated that, in March, 1856, the plaintiff sent to defendant's counting-house, and requested defendant to call on him. Defendant accordingly went. Plaintiff said he knew the defendant wished to serve him, and render him all the assistance in his power, to which defendant assented. The plaintiff then said he wished defendant to accept the composition which he had offered to his creditors, of 5*s.* in the pound; that the defendant at once assented; the plaintiff then, voluntarily and without any suggestion, said he "should give defendant his I O U, bearing his private signature, for the amount he owed defendant, and that he would pay it as a debt of honour." Thereupon defendant, at plaintiff's suggestion, wrote out an I O U for 836*l.* 10*s.* 2*d.*, and the plaintiff signed it.

That when this I O U was signed and handed to the defendant, there was no arrangement or agreement, as untruly alleged in the bill, nor any understanding whatever between them, that the plaintiff should, at defendant's request or otherwise, accept bills to the same amount; no mention was made of any bills of exchange or other security, nor did defendant then undertake to account for the composition of 5*s.* in the pound on the debts. Defendant accordingly unconditionally acceded to the composition, and assigned his debt to Mr. Quilter as above mentioned. That the defendant in various ways exerted himself to promote the plaintiff's interests; and on one occasion the plaintiff told defendant he should lose nothing by serving him in the way in which he was doing, viz. advancing him money, as the I O U which plaintiff had given defendant "was a debt of honour, which he (plaintiff) should assuredly pay as soon as he got into business."

In September, 1859, the defendant Warner indorsed

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over to Messrs. Neild & Co. the bill for 836*l.* 10*s.* 2*d.*, accepted by the plaintiff, and due on the 6th of October following.

The other bills were presented when due, and dishonoured, but were renewed by the defendant on the 3rd of October, 1859, at four months' date. On the 10th of February the defendant wrote to the plaintiff, inquiring what he proposed to have done about the bills, when the plaintiff, the following day, wrote to the defendant as follows:—

"Dear Sir,—The two drafts of 300*l.* each are similar to those which the Court of Chancery has decided to be invalid.

"Faithfully yours,

"C. J. MARE."

The defendant alleged, that he was, and had been ready to renew the bill if necessary, or to take it up at maturity, but contended that the plaintiff had acted in bad faith by giving bills which he intended to dispute.

Argument.

Mr. *Craig* and Mr. *Caldecott* contended, that the transaction was illegal and void, and was within the principle of the decision in *Mare* v. *Sandford* (*a*). It might be an ungracious thing for the plaintiff to take the objection, but the Court could only consider the question of public policy, which made this transaction void.

Mr. *Malins* and Mr. *Druce*, for the defendant, contended, that the giving of the three bills was an entirely new transaction, and unconnected with the prior one. The I O U, it was admitted, was invalid; but these bills were not to validate the former transaction, but in consideration of the gratitude which the plaintiff owed the defendant. The plaintiff owed the defendant a large

(*a*) *Antè*, vol. 1, 299.

sum, which it was admitted he was not legally bound to pay, but which, if he elected to discharge, the moral obligation formed a good consideration for the securities. It was clear, if, instead of these securities, he had paid the debt in money, he could not have recovered it again. At all events, the plaintiff was not entitled to costs.

Argument.

THE VICE-CHANCELLOR:—

Judgment.

The plaintiff, by an illegal, corrupt, and disgraceful bargain with the defendant Warner, affected to pay him 5*s.* in the pound on his debt, but secretly gave him an I O U, or obligation to pay 836*l.*

In consideration of that corrupt bargain, and in order to carry it into effect, the defendant Warner assigned his debt to Quilter, who was thereby enabled to appear as the assignee of Warner, and to accept a composition of 5*s.* in the pound on Warner's debt.

It has been said, on behalf of the defendant, that giving the bills was a new transaction, and perfectly valid. The transaction, however, was a mere renewal of that for which the I O U was first given; and if the I O U was worthless, the bills given in its place were equally worthless.

It has also been said that if, instead of giving bills for 836*l.*, the plaintiff Mare had paid that amount to the defendant Warner, the former could not have got it back. But in that case the matter would have been completed, and it would no longer have rested in contract.

The transaction of giving the bills is so tainted with fraud and illegality, that there must be a decree for the delivery to the plaintiff of the two bills for 300*l.* each, and for payment of the amount of the third bill to the plaintiff.

In the case of *Mare* v. *Sandford*, I gave the plaintiff his costs on the ground of public policy, though his conduct entitled him to no indulgence. But I have since

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thought that public policy will be better maintained by giving a plaintiff who comes forward with such a case no costs. Each party, therefore, must bear his own costs.

Judgment.

May 1st.

MARE *v.* EARLE.

THE bill in this case was framed on the same principle as in the preceding case of *Mare* v. *Warner;* on the bankruptcy of the plaintiff, as stated above, the defendants, who carried on business as timber merchants, proved for a debt of 3724*l.* 19*s.* 6*d.*

The bill alleged that, the defendants having refused to compound their debt for 5*s.* in the pound, without security for a further sum of 5*s.* in the pound, an arrangement was entered into between the plaintiff, Samuel Mare, the plaintiff's broker, and the defendants (the plaintiff, as he alleged, being ignorant that the arrangement was in violation of the law of bankruptcy), that Samuel Mare should draw on the plaintiff for the amount of 5*s.* in the pound; that the plaintiff should accept the bill; and then, that Samuel Mare should indorse the bill to the defendants. In pursuance of this arrangement, Samuel Mare drew, and the plaintiff accepted a bill at twelve months' date for 931*l.* 4*s.* 11*d.*, which was indorsed to the defendants. By a deed, dated the 11th of April, 1856, between Samuel Mare and the defendant Robert Jones (on behalf of himself and his partners), it was witnessed that, in consideration of a sum of 931*l.* 4*s.* 11*d.*, to the said Robert

Jones paid by the said Samuel Mare, and of a further sum of 931*l.* 4*s.* 11*d.*, secured by a bill drawn by Samuel Mare, and accepted by the plaintiff, the said Robert Jones assigned to Samuel Mare all that debt of 3724*l.* 19*s.* 11*d.* It was by the said deed provided that, in case the said Charles John Mare should not supersede his bankruptcy, and his estate and effects should realise more than the sum of 10*s.* in the pound received from the said Samuel Mare, then that the said Samuel Mare should pay to the defendants such sum and sums as, together with the said sums of 931*l.* 4*s.* 11*d.* then paid, and 931*l.* 4*s.* 11*d.*, the amount of the bill, should amount to the dividend which should be received and payable under the said estate—9*d.* in the pound being deducted for expenses thereon; and the said Robert Jones agreed that there should be no lien or claim in equity on the said debt, by reason of the sum secured by the said bill being unpaid.

The bill charged that the said assignment, though in form made to the defendant Samuel Mare, was in fact an assignment in favour of the said William Quilter, and was so to the knowledge of the defendants, and the sum of 931*l.* 4*s.* 11*d.* therein stated to have been paid by the defendant Samuel Mare to the defendant Robert Jones, was in fact paid to him by the said William Quilter.

The form of the said assignment was the subject of considerable communication between the plaintiff and the defendants, other than the defendant Samuel Mare, and between the same defendants and their solicitor, Mr. John Clarke Meymott, and particularly the defendant Robert Jones, on the 29th day of March, 1856, wrote and sent a letter of that date, and further dated "¼ past 2," which, except as to the formal parts thereof, and an immaterial postscript thereto, was as follows, that is to say:—

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"RE MARE.

"Will you be good enough to read the accompanying documents and return them by the bearer, or between this and four o'clock, stating whether you consider them such as we ought to sign, and sufficient to carry out the arrangement as explained to you yesterday. You will perceive that Mare does not undertake to give us a lien on his assets, which, as you seemed to think, was a point scarcely worth stipulating for. And further, that Quilter claims a deduction of ninepence in the pound, for his commission upon any sum which the estate might realize beyond five shillings, in the event of the bankruptcy being superseded. Monday being the last day of our year, I wish to have this completed in the meantime, and therefore want to return the papers to Mare this afternoon."

The said assignment was executed in duplicate, and the form and execution thereof was arranged with and had under the direction of the said William Quilter; and the said assignment and its duplicate were, on the execution thereof, delivered over to the said William Quilter, as to the original thereof to him as the person in whose favour such assignment was in fact made, and as to the duplicate thereof for the purpose of the said William Quilter procuring the same to be stamped, and the said William Quilter accordingly procured the same to be stamped; and on the 16th day of July, 1856, wrote and sent to the said John Clarke Meymott a letter of that date, which, except as to the formal parts thereof, was as follows, that is to say:—

"RE C. J. MARE.

"Herewith I send you the duplicate assignment of the debt due from the above estate to Messrs. J. Dowson

& Co., executed by Mr. Jones to myself, and left with me for the purpose of being stamped with the original document. Be so good as to acknowledge its receipt, and remit me five shillings for the stamp."

Statement.

The bankruptcy was annulled on the 24th December, 1857, in consideration of a dividend amounting altogether to 4*s.* in the pound. Samuel Mare received that amount on the defendant's debt, and paid the same to Mr. Quilter.

The defendant subsequently brought an action on the bill, whereupon, on the 28th of December, 1859, the plaintiff filed this bill, and obtained an injunction restraining the action.

The bill prayed for a declaration, that the said transaction was invalid, and that the bill of exchange might be delivered up to be cancelled. The bill charged that the assignment of Samuel Mare was in fact an assignment to William Quilter.

Argument.

Mr. *Craig* and Mr. *Caldecott* appeared for the plaintiff, and relied on his Honour's judgment in the cases of *Mare* v. *Sandford* (*a*) and *Mare* v. *Warner* (*b*).

Mr. *Bacon* and Mr. *W. Forster* contended, that this case was distinguishable from the other cases. The principle of the decision in *Mare* v. *Sandford* and *Mare* v. *Warner* was, that there had been a secret bargain; but in this case the defendants acted without any desire for concealment. They refused to accept 5*s.* in the pound, but agreed to accept 10*s.* It was submitted, that a creditor had a right to stipulate for what terms he pleased.

It was submitted further, that the bill was defective, inasmuch as Samuel Mare was not a party (*c*).

(*a*) *Antè*, vol. i. 288.
(*b*) *Antè*, 100.
(*c*) Samuel Mare was, in consequence of this objection, made a party, and Mr. E. C. Dunn appeared for him.

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Judgment.

THE VICE-CHANCELLOR:—

The plaintiff must amend the bill, by making Samuel Mare a defendant. The arrangement which has been effected by the plaintiff with the defendants contravenes the well-established principle of the bankrupt law, that there should be equality in the distribution of the bankrupt's effects. The defendant cannot, therefore, be allowed to enforce that arrangement; and there must be a declaration that the bill is invalid, and it must be delivered up. On the question of costs, as the plaintiff's conduct has more culpable than that of the defendants, he ought not to get his costs. There will, therefore, be no order as to costs.

NOWELL *v.* THE ANDOVER AND REDBRIDGE RAILWAY COMPANY.

May 1st.

Bill against the directors of a railway company which had power to borrow monies, not exceeding 45,000*l.*, "on mortgage or bond," so soon as the whole capital had been subscribed and one-half paid up, alleging that monies had been illegally borrowed and praying for a declaration that such borrowing was illegal, and to restrain the defendants from repaying the monies out of the company's assets. Demurrer allowed on the ground that there was no allegation that one-half of the subscribed sum had not been paid up, or that the defendants intended to issue bonds or mortgages before it was due.

THIS bill was filed on the 28th of March, 1861, by Frederick Nowell, on behalf of himself and all other the shareholders of the Andover and Redbridge Railway Company (except the defendants), against the company and five of the directors.

The bill alleged, that the company was incorporated by a special Act of Parliament in 1858, by which it was enacted that the capital should consist of 130,000*l.*, in 13,000 shares of 10*l.* each.

By the 8th section it was enacted, "that the company might borrow on mortgage or bond any sums not exceeding in the whole the sum of 43,000*l.*, but that no part of such sum should be borrowed until the whole of the said

capital or sum of 130,000*l.* should have been subscribed for, and one-half thereof actually paid up."

The bill further alleged, that by a report issued by the directors it was stated, as the fact was, that the directors had already borrowed, for the purposes of the company, the sum of 39,887*l.* 10*s.* previously to the 30th of June, 1860, and also a further sum of 898*l.* 1*s.* 1*d.* up to the 31st of December, 1860; the two sums making together 40,785*l.* 11*s.* 1*d.* That the actual paid-up capital on the 30th of June, 1860, did not exceed the sum of 30,157*l.* 6*s.* 8*d.*, and that the portion which had been actually paid up on the 31st of December, 1860, did not exceed the sum of 52,552*l.* 13*s.* 4*d.*; each of which sums was considerably less than one-half of the capital of the company, inasmuch as one-half of such capital amounted to the sum of 65,000*l.*

The bill alleged that the said sums so borrowed by the directors as aforesaid had not, nor had any part thereof, been repaid, nor had the repayment thereof, or of any part thereof, yet been secured, or purported to be secured, by any mortgage, bond, or other security binding or purporting to bind the company or its assets.

The bill charged that, under the circumstances aforesaid, the borrowing powers of the company had not, on the 31st of December, 1860, come into operation, and that the sums so borrowed by the directors as aforesaid were borrowed by them without any power or authority to borrow the same on behalf of the company, and that the company and its assets were not then, and ought not to be made, chargeable with the sums so borrowed, or any part thereof, or with any interest in respect of the same.

The bill further charged, that the directors alleged that the monies so borrowed were borrowed on behalf and for the purposes of the company, and that the company were properly chargeable with and liable to repay the same, and all interest which had theretofore accrued, or which

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Statement.

should thereafter accrue in respect of the same. That the same defendants, moreover, intended to repay the monies so borrowed, with interest thereon, or some part of such monies and interest, out of the monies of the company then in or which should thereafter come to their hands, and to issue mortgages or bonds, under the seal of and purporting to bind the company, for securing to the persons who had advanced the same repayment of so much of the said borrowed monies and interest as should not be actually repaid by them as last aforesaid, out of the monies of the company.

The bill prayed that it might be declared that the borrowing as aforesaid of the said sums of 39,887*l.* 10*s.* and 898*l.* 1*s.* 1*d.* on behalf of the company, was improper and illegal, and that neither the company nor its assets were or ought to be made chargeable with, or liable to repay, the same or any part thereof; and for an injunction to restrain the defendants from repaying the sums so borrowed or any part thereof, or any interest in respect of the same, out of the monies or assets of the company, and from issuing or making any mortgage or bond, or doing or suffering any other act or thing which should charge or pledge, or purport to charge or pledge, the company, its assets or credits, with or for the repayment of the sums so borrowed as aforesaid, or any part thereof, or any interest in respect of the same.

Argument.

Mr. *Bacon* and Mr. *De Gex*, for the demurrer.—The bill shows no case for relief. There was nothing in the bill to show, that when the bill was filed one-half the capital had not been paid up. So far from there being any allegation that the directors had borrowed money on mortgage or bond, the very reverse was alleged, that they had not. The bill, indeed, stated that the directors intended to charge such monies against the assets of the company, but it does not allege that the directors intended to borrow

money on mortgage or bond before they were entitled to do so, *i.e.* when the required capital had been subscribed for, and one-half actually paid up.

1861.

NOWELL v. THE ANDOVER AND REDBRIDGE RAILWAY COMPANY.

Mr. *Malins*, Mr. *Locock Webb*, and Mr. *Phear*, for the plaintiff.—Although the express prohibition in the special Act was against borrowing on mortgage or on bond, yet the borrowing of money in any other way by the company before half the subscribed-for capital had been paid up was *ultra vires* and equally prohibited by the implied meaning, if not by the express terms of the Act. It was well settled, that a corporation could not contract except by an instrument under the corporate seal. It was not, therefore, necessary to allege by the bill that half the capital had not been paid up, or that the directors intended to raise money by mortgages or bonds before that event had occurred.

Argument.

THE VICE-CHANCELLOR:—

There is a fatal defect in the bill. In order to show that the alleged acts of the defendants are illegal, it is necessary to prove, or, on demurrer, to allege, that one-half of the subscribed sum is not paid up, or that the company intend to issue bonds or mortgages before it is due. There is no such allegation in the bill.

Judgment.

The demurrer must, therefore, be allowed.

1861.

May 7th.

WILKINS *v.* HOGG.

Bill against two of three trustees to make good trust monies, which they had allowed their co-trustee to receive, dismissed with costs: the will having, besides the usual indemnity clause, provided "that any trustee who should pay to his co-trustee, or enable him to receive monies, for the general purposes of the will, should not be obliged to see to the due application thereof, or be responsible by express or implied notice of the misapplication."

THIS bill was filed by the *cestui que trust* under the will of Mrs. Lockyer, against Charles Hogg and Mary Banister, praying that they might be decreed personally liable, and decreed to make good two sums of 2000*l.* each, being the proceeds of certain policies in the bill mentioned.

Isabella Lancaster Lockyer, by her will, appointed the defendants, Charles Hogg, Mary Banister, widow, and Samuel Jackson Reid, the executors and trustees of her said will, and she thereby directed and authorised her said executors, within three months after her decease, to effect in their own names an insurance of 4000*l.* on the life of Sophia H. Wilkins in some good and respectable office in London or Westminster, and that they should stand possessed of and interested in the said policy, and the monies secured thereby, for the benefit of the plaintiffs, the children of the said Sophia H. Wilkins, in manner therein mentioned.

The indemnity clause in the will was as follows:—"And I declare, that such trustee shall be answerable only for losses arising from his own defaults, and not for involuntary acts, or for the acts or defaults of his co-trustees or trustee; and particularly that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any monies for the general purposes of my will, or for any definite purpose authorised by my will, shall not be obliged to see to the due application thereof, nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same monies."

The word "such," it was stated, was in the draft copy.

The testatrix died on the 13th of November, 1854.

Shortly after her decease, the trustees and executors effected two policies of assurance for 2000*l.* on the life of the said Sophia H. Wilkins; and she died on the 22nd of May, 1857. After her death the two sums of 2000*l.* and 2000*l.* became payable by the insurance offices, and were received by the defendant Samuel Jackson Reid, less some small deduction. The defendants alleged, that they had permitted Jackson to receive the money on the distinct understanding that he was to deposit it forthwith in the Union Bank, in the joint names of the three trustees. They deposed, that Reid informed them that he had done so, but had, in fact, not done so, but appropriated the monies to his own use.

Statement.

The defendant Hogg had previously filed a bill against his co-trustees, for the purpose of receiving the trust fund, and had obtained a decree against Reid, who, however, had absconded.

The defendants insisted, that but for the indemnity given by the will they would not have consented to act.

Mr. *Malins* and Mr. *Southgate* for the plaintiffs.— There was here clearly a gross breach of trust; and it was for the defendants to show that they were not responsible. They relied for their defence on the terms of the indemnity clause contained in the will; but no expression of indemnity, however strong, was sufficient to exonerate trustees from gross misconduct.

Argument.

In *Brice* v. *Stokes* (*a*), a trustee who never received money, was charged for permitting his co-trustee to retain the possession of the fund.

In *Joy* v. *Campbell* (*b*), executors who joined in a receipt for the trust money, which was, however, actually received by one only, and lost, were held liable to make it good.

(*a*) 11 Ves. 319. (*b*) 1 Sch. & L. 328—341.

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In *Williams* v. *Nixon* (*a*), where two executors sold stock, but the produce was received by one only, and by him misapplied, the other was held liable.

[*Moyle* v. *Moyle* (*b*), *Pride* v. *Fooks* (*c*), *Worrall* v. *Harford* (*d*), *Hanbury* v. *Kirkland* (*e*), were cited. See also *Clough* v. *Bond* (*f*).]

Mr. *Bacon* and Mr. *F. Webb* appeared for the defendant Hogg.

Mr. *Elmsley* and Mr. *Boyle* for the defendant Banister.

Judgment.

THE VICE-CHANCELLOR:—

The indemnity clause in this will is framed in very unusual terms.

It authorises the trustees to pay money into the hands of their co-trustee, without being responsible for his misapplication of it, in a way very unusual.

It has been argued that, notwithstanding the extraordinary authority which this clause gives to the co-trustees to pay their money into the hands of any one of them for the several purposes of the will, without being in any degree responsible for its misapplication, this case is to be dealt with precisely in the same way as if there were no more than the usual indemnity clause. The argument has proceeded on the assumption, that the usual indemnity clause amounts to nothing; that it never receives a literal interpretation; but that the Court will look generally at the conduct of the trustees, and, for any carelessness, or any act that a prudent man ought not to have committed, will visit the trustee who has been guilty of such acts, whatever may be the language of the will.

That is not the law of this Court. It is admitted that, if this will had said that the two other trustees

(*a*) 2 Beav. 472.
(*b*) 2 R. & M. 710.
(*c*) 2 Beav. 431.
(*d*) 8 Ves. 4.
(*e*) 3 Sim. 265.
(*f*) 3 M. & Cr. 490.

might pay the whole monies into the hands of Reid, without being in any degree responsible for his misapplication of it, the Court could not hold that they were responsible. Then, what is the true meaning of this clause? It is not merely that the two may pay into the hands of Reid, but that any one of the two may pay into the hands of any third of them without being responsible for any misapplication by that third. The language is as plain as language can be. After the words of general indemnity, the testatrix says, "And particularly that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any monies for the general purposes of my will, or for any definite purpose authorised by my will, shall not be obliged to see to the due application thereof, nor shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same monies."

There can hardly be language more clear or more explicit. The act for which it is sought to make the defendant liable is the concurrence by Mrs. Banister and Mr. Hogg, two of the three trustees, in paying the money to Reid, the third trustee, by whom it was misapplied. This is precisely the case in which the testatrix declares that her trustees shall not be responsible for the misapplication of the fund. The two trustees, by this bill, are now sued for a "misapplication" which was not made by them, but which, it is admitted, was made by Reid. But it is said that, in order to be within this extraordinary indemnity, the payment must be for the general purposes of the will. What does that mean? Was this money allowed by them to be received by Reid for any other purpose than the purposes of the will, if they allowed it to be received by Reid in order that it might be properly invested upon the trusts of the will? The only ground on which, considering the extraordinary language of this

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testatrix, that the case of the plaintiffs might be supported was this—that, notwithstanding the authority to the two to allow the money to come into the hands of the third, yet, by subsequent carelessness and negligence, they might have permitted a misapplication by that third. But this bill proceeds on no case of that kind; and indeed the facts exclude that view, because, in fact, the money scarcely reached Reid's hands before he misapplied it without any privity of theirs. They believed he would act honestly. He was guilty of immediate dishonesty; he never applied the money to the purposes of the will; he misapplied it for his own purposes. The words of the will make it impossible to hold these two co-trustees answerable for the misapplication by Reid, without wholly disregarding the express words of the testatrix. It has been said by Mr. Malins, that the Court will never allow any clause of indemnity to shelter a gross and abominable breach of trust. But no such case has been made out against these defendants. They have certainly been guilty of no gross breach of trust, even if their conduct was strictly a breach of trust at all. It is not a true view of the case to say that they committed a breach of trust in allowing the trust fund to be paid to Reid. The testatrix had said that they might safely do what they have done. The misconduct has been on the part of Reid, against whom a decree of the Court has been already made; and who was the confidential agent of the testatrix herself. Therefore, the decree must declare that, according to the true construction of the will of the testatrix, the act and concurrence of the defendants, Hogg and Mary Banister, in enabling the defendant Samuel Jackson Reid to receive the two sums of 2000*l.* and 1955*l.* 10*s.*, as in the pleadings mentioned, do not render them liable for the misapplication of the said two sums of money, or any part thereof, by the said Samuel Jackson Reid. Order all proceedings in this

cause to be stayed, and liberty to the plaintiffs to go in under the cause of *Hogg* v. *Reid*, and to apply for the conduct of the said cause.

The costs of the defendants Hogg and Mary Banister to be costs in the cause of *Hogg* v. *Reid*.

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May 22nd.

In giving effect to a wife's equity to a settlement, the proportion which the Court will settle is discretionary. Therefore, where the husband was partner in a firm, which on its bankruptcy was indebted to the testator in an amount greatly exceeding 13,000*l.*, no settlement having been made on the marriage, and the wife and children being unprovided for, but not deserted, the Court ordered the whole fund, amounting to 13,000*l.*, to be settled on the wife and children.

VERE HERBERT SMITH, by his will, dated the 12th day of February, 1859, after giving certain legacies, bequeathed and devised all his other real and leasehold messuages, lands, and hereditaments to trustees upon trust, as soon as conveniently might be after his decease to sell the same, and upon trust to divide the same into seven parts; and as to one equal seventh share, the testator directed his trustees to retain the same, and to invest it in the same manner as the will directed, and to pay the interest, dividends, and annual proceeds thereof, into the proper hands of his son-in-law, Thomas Lawrence, during their joint lives, and the life of the survivor of them, or until he shall become bankrupt, or take the benefit of the Insolvent Act, or attempt to alienate, or mortgage, or dispose of the same, or any part thereof. And from and after the death of the survivor of them, the said Thomas Lawrence, and Ann, his wife, and also from and after such bankruptcy, insolvency, or attempted alienation, as aforesaid, which shall first happen, then in trust, to divide, pay, or transfer the said seventh part or share, unto and equally among all the children of her said daughter, Ann Lawrence, as tenants in common, on their attaining their respective ages of twenty-one years. The testator then, after other pro-

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visions, proceeded thus:—"And I bequeath all my personal estate; chattels goods, monies, and effects, except what I otherwise bequeath by this my will, or any codicil, unto my said trustees hereinbefore named, upon trust to sell, call in, and convert into money, all my personal estate; and I declare that the said last mentioned trustees, and the survivors and survivor of them, and the executors, administrators, &c., of such survivors, shall, by and out of the monies to arise from the sale, calling in, and conversion into money, of my personal estate and effects, pay my personal and testamentary expenses and debts, and the legacies bequeathed by this my will, and any codicil thereto, and subject thereto, &c., and shall divide and pay the residue of the said monies between and among all my children, in equal shares and proportions.

The testator died on the 21st of March, 1860, and his will was proved shortly afterwards. On the testator's death, there was due to his estate from the firm of Messrs. Streatfield, Lawrence, & Co., of which the husband, Thomas Lawrence, was a member, a sum of 10,000*l.* due on a note of hand, dated the 2nd of January, 1860, and also on a note dated the 29th of January, 1859, from Messrs. Smith to Messrs. Streatfield, Lawrence, & Co., and indorsed by them to the testator's order for 10,000*l.*, with interest at 5*l.* per cent. less 200*l.*, which had been paid.

There was also due to the testator's estate from William Anning a sum of 7500*l.*, which was secured in several ways, and also by the guarantee of Messrs. Streatfield & Lawrence.

Messrs. Streatfield, Lawrence, & Co., were adjudicated bankrupts.

A bill was filed on the 21st of July, 1860, to administer the testator's estate, and it was referred to Chambers to take the usual accounts and inquiries. In November, 1860, Mrs. Lawrence presented a petition, praying that a proper settlement might be made on her and her chil-

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dren, on which it was referred to the chief clerk, to inquire and state what ought to be settled on the petitioner. Evidence was adduced, showing that Mrs. Lawrence was suffering from a permanent affection of the heart, and her state of health was such as to make it unlikely she would recover, and also that one of her children suffered from epileptic attacks, which incapacitated him from maintaining himself.

Statement.

It was proposed in chambers that the whole fund should be settled on Mrs. Lawrence, to which the chief clerk acceded.

On the 8th of July, 1861, the chief clerk made his certificate, whereby he found that the debts above mentioned, with numerous others, were due to the testator's estate.

It appeared from the evidence, that Mrs. Lawrence's share in the residuary personal estate was from 13,000*l.* to 15,000*l.* It appeared from the evidence, that no settlement had been executed on the marriage of Mrs. Lawrence, but that on the occasion of the marriage the testator presented the husband with 1000*l.* The assignees in bankruptcy now moved to vary the chief clerk's certificate.

Argument.

Mr. *Bacon* and Mr. *De Gex* for the assignees.—There was no invariable rule as to the amount which the Court will direct to be settled, but the Court is chiefly guided by two considerations: first, the amount of provision that has been made for the wife and children; and, secondly, whether the wife has been deserted by her husband. In this case, the husband was living with his wife, and would no doubt maintain her, and the testator had made a large provision for the parents, which, in the events that happened, enured for the benefit of the children.

In many cases the Court directed half the fund to be

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settled on the wife. In *Napier* v. *Napier* (*a*), out of a sum of 1000*l.*, the Court directed 400*l.* to be paid to the husband's creditors, and 600*l.* to be settled on the wife and children.

In *Barrow* v. *Barrow* (*b*), the Court settled the income of 10,000*l.* Consols (the whole fund) on the wife, but on the ground of the husband's adultery and separation; and the Court held, that in making the settlement, the Court looks particularly at the husband's conduct. Moreover, there the question was between the husband and wife.

In *Carter* v. *Taggart* (*c*), two-thirds of the fund, 5000*l.*, were settled.

In *Dunkley* v. *Dunkley* (*d*), the whole fund, 10,000*l.*, was settled on the wife, but the decision was rested on the circumstances of the case, which showed that the wife had been deserted.

In *Bagshaw* v. *Winter* (*e*), one-half the fund, 1000*l.*, was given to the assignees. Generally, it would be found that where the whole fund was settled, it was in cases of misconduct, and not of mere bankruptcy.

Mr. *Malins* and Mr. *Hetherington* appeared for Mrs. Lawrence.

Mr. *Kay* appeared for the trustees and executors.

Judgment.

THE VICE-CHANCELLOR:—

The duty of the Court in all these cases is discretionary; and its discretion must be exercised upon the facts before it, as to whether the whole, or less than the whole fund shall be settled.

(*a*) 1 Dr. & W. 407.
(*b*) 7 De G. M. & G.
(*c*) 5 De G. & S.; s. c. 1 De G. M. &. G. 286.
(*d*) 2 De G. M. & G. 300.
(*e*) 5 De G. & S. 466.

At one time there was an opinion that, where the fund was claimed as between the wife and children and the assignees of the bankrupt, one-half only ought to be settled on the wife. In the case of *Beresford* v. *Hobson* (*a*), Sir T. Plumer is reported to have said, that in no case had the Court given the whole fund to the wife (*b*), but that generally, the authorities went to sanction the proposition that one-half should be settled on the wife and the other half on the assignees. But since that case there have been several in which the Court has ordered the whole fund to be settled.

In dealing with the circumstances of the present case, and looking at the fact that there was no settlement made on the marriage of the lady; that the husband had received a gift of 1000*l.* made to him by the father of the lady; that while the son-in-law was in business as member of a partnership, the testator made large advances to the partnership, which is indebted to him in an amount which greatly exceeded the sum which it is now sought to have settled—having regard also to the station in life of the lady, and to her own maintenance and the maintenance of her children—whether the amount of the fund is 13,000*l.*, 14,000*l.*, or 15,000*l.*, it is not such an amount as that the Court can exercise its discretion properly by saying that less than the whole shall be settled on the wife and children.

During the argument, cases were referred to where the whole fund was settled on the wife; and it was said they were not cases of bankruptcy, but cases in which there had been gross misconduct on the part of the husband. In a case of bankruptcy, or insolvency, where the husband, as here, an uncertificated bankrupt, continues living with the wife, there being no desertion of the wife by

(*a*) 1 Madd. 362. (*b*) Ibid. 374, 379.

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the husband, the Court is bound to consider that, instead of the husband maintaining the wife, the wife will in fact be obliged to support the husband out of this very fund.

Therefore, looking at all the circumstances, there is no ground for disturbing the certificate; and the motion must be refused, but without costs.

May 8th.

Re MALLIN'S SETTLED ESTATES.

Under the Settled Estates Acts, 19 & 20 Vic. c. 120, the Court has jurisdiction to direct the sale of minerals beneath the surface separately from the land.

IN this case a petition had been presented by the tenant for life of certain real estates, which were settled under the will and settlement of Mrs. Mallin, and it alleged, that certain persons named Bagnall had agreee to become the purchasers of the Thick Coal at the price of 600*l.* an acre. That the surface of the settled estates had become surrounded by houses, and and that it was desirable that it should be sold in building lots. The petition, therefore, prayed the Court to authorise the sale of the surface of the settled estates for building purposes; to sanction the acceptance of Bagnall's offer, and to authorise the sale of the Thick Coal to them; also to appoint the petitioner the person to convey this coal to the proposed purchasers.

The Court, on the hearing of the petition, referred it to chambers, to inquire whether it would be for the benefit of the parties entitled to the estate, that the agreement with the Messrs. Bagnall should be carried into effect, and if so, whether by lease or grant.

The chief clerk, on that reference, certified it would be beneficial to grant a lease of the coal for ten years for the

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sum of 1800*l.* The certificate was approved, and it was ordered, that the lease should be executed by the trustees, and the purchase monies paid into court.

Statement.

A lease was accordingly prepared, whereby the minerals were granted for the term of ten years, without reserving any rent, and was submitted to one of the conveyancing counsel of the Court, who advised, that the minerals could not be sold separately from the surface, and that a lease for the term of ten years was not within the Act (*a*).

In order to try the question, the purchaser now moved, that the order confirming the purchase might be set aside, and the 1800*l.* paid out of court.

Argument.

Mr. *Craig* appeared on the motion, and submitted the question raised to the court.

Mr. *Ince* appeared for the petitioner.

Mr. *R. W. E. Forster*, Mr. *Druce*, Mr. *Bagshawe*, and Mr. *Westlake*, appeared for the different parties interested.

(*a*) "XI.—It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing on any settled estates; and every such sale shall be conducted and confirmed in the same manner as, by the rules and practice of the Court for the time being, is or shall be required in the sale of land sold under a decree of the Court.

"XIII.—On any sale of land, any earth, coal, stones, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenant, or submit to any restrictions which the Court may deem advisable."

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Re MALLIN'S SETTLED ESTATES.

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[The Settled Estates Act, 19 & 20 Vic. c. 120, ss. 12 and 13, was referred to.]

THE VICE-CHANCELLOR:—

I have no doubt that the Court has power under the Act to authorise the sale and conveyance of minerals apart from the surface of the land. But it is very doubtful whether, as there is in fact no rent, but a gross sum paid down at once, a demise is the proper mode for giving effect to the agreement. The transaction is in fact a sale; and any advantage which might arise from a demise in the form prepared, may be equally well secured by a covenant to work out the mine in ten years.

May 23rd.

THE MARCHIONESS OF LONDONDERRY *v.* BAKER.

Plea of an order allowing a demurrer to a former bill by the same plaintiff against the same defendant for the same relief; but there was no averment in the plea that the allegations in the bill pleaded to were the same as in the former bill.—Plea overruled.

ON the 3rd of November, 1860, the plaintiff filed her bill against H. J. B. Baker, praying that a certain lease, dated the 15th of April, 1856, and the counterpart of such lease might be declared void against the plaintiff, and might be set aside and delivered up to be cancelled; and that the defendant might be restrained by injunction from commencing or prosecuting any action against the plaintiff for recovering any rent due, or thereafter to become due, under the terms of the said lease. On the 19th of November, 1860, the defendant demurred to the bill for want of equity. On the 5th and 6th of December, 1860, the demurrer came on to be argued, when Vice-Chancellor Wood allowed the demurrer with costs,

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but gave the plaintiff leave to amend within fourteen days, or, in default, that the bill should stand dismissed with costs. The bill, not having been amended, was accordingly dismissed.

On the 14th of March, 1861, the plaintiff filed this bill, praying for the same relief, nearly in the same terms.

On the 14th of May, the defendant filed a plea, setting forth the former bill, and alleging the order of Vice-Chancellor Wood; that the said order had been entered and enrolled; and that the bill had not been amended within the time prescribed (*a*).

(*a*) The plea further alleged as follows:—"I, the said Henry John Baker Baker, by protestation, not confessing all or any of the matters or things in and by the said bill set forth and alleged to be true, do plead to the whole of the said bill; and for plea thereunto, I say, that on the 3rd day of November, 1860, and before the filing of the said bill, the above-named plaintiff in this suit filed her other bill of complaint against me in this Honourable Court, in the words and figures following, that is to say—[here follows a full copy of the bill]—as by the last-mentioned bill, reference being thereunto had, will more fully appear; and I crave leave, for greater certainty, to refer to such bill. And I further say, that, on the 15th day of November, 1860, and before the filing of the said bill now being pleaded to, I duly appeared to the said bill of the 3rd day of November, 1860; and I further say, that, on the 19th day of November, 1860, and before the filing of the said bill now being pleaded to, I duly filed my demurrer to the whole of the said bill of the 3rd day of November, 1860, and, by the said demurrer, I demurred to the last-mentioned bill, and for cause of demurrer showed that the plaintiff had not, by her last-mentioned bill, stated any case which entitled her in a court of equity to any relief or discovery in respect of the matters therein alleged, or any of them; wherefore, and for divers other good causes of demurrer appearing in the last-mentioned bill, I demurred thereto, and prayed the judgment of the Court whether I should be compelled to make any further answer thereto, and prayed to be dismissed hence with my reasonable costs in that behalf sustained, as by the said demurrer, reference being had thereunto, will more fully appear, and I crave leave for greater certainty to refer thereto. And I further say, that, on the 5th and 6th days of December, 1860, and before the filing of the said bill now being pleaded to, the said demurrer came on to be argued in this Honourable Court, before his Honour Vice-Chancellor Wood, in the presence of counsel

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Argument.

Mr. *Rolt* and Mr. *Marten*, for the defendants.—Where a bill had been filed, and a demurrer to it allowed by the Court, with liberty to amend, of which the plaintiff declined

for the plaintiff and for me; and, upon opening and debate of the matter, and hearing what was alleged by the counsel for the plaintiff and for me, the said Court held the said demurrer to be good and sufficient; and thereupon, by the order of this Honourable Court, dated the 6th day of December, 1860, made on that day by the said Vice-Chancellor on the said argument, and opening, and debate, and hearing of the said demurrer, and before the filing of the said bill now being pleaded to the said Court, did order that the same demurrer do stand and be allowed. And by the same order it was ordered that the plaintiff do pay to me my costs of the said demurrer, to be taxed by the taxing-master, and that the plaintiff be at liberty within fourteen days to amend her last-mentioned bill, as she should be advised, or, in default thereof, it was ordered that the plaintiff's last-mentioned bill do stand dismissed out of this Honourable Court as against me, without further order, with costs, to be taxed by the said taxing-master, which order has been duly signed and enrolled, and remains of record in this Honourable Court as by the said order and the record of the enrolment thereof, reference being thereunto had will more fully appear, and I crave leave for greater certainty to refer thereto. And I further say, that the plaintiff did not amend her said bill of the 3rd day of November, 1860, within the said time within which, by the said order of the 6th day of December, 1860, she was at liberty to amend the same, and that she made default thereof. And I further say, that the last-mentioned time, within which the plaintiff was at liberty to amend her said bill, expired long before the filing of the said bill now being pleaded to; and that, in pursuance of the said order of the 6th day of December, 1860, and in default as aforesaid of amendment, and before the filing of the last-mentioned bill, the said bill of the 3rd day of November, 1860, stood dismissed out of this Honourable Court as against me, without further order, with costs, to be taxed by the said taxing-master. And I further say, that the last-mentioned costs and the said costs of the said demurrer were duly taxed before the filing of the said bill now being pleaded to; and I further say, that the said Court upon the said demurrer clearly decided upon the merits of the question between the plaintiff and myself, and the said order of the 6th day of December, 1860, determined the rights of the plaintiff and myself in respect of the matter which the said bill of the 3rd day of November, 1860, was for. And I further say, that the said bill now being pleaded to is for the same matter as the matter which the said bill of the 3rd

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to take advantage, and where a second bill had been filed between the same parties, in the same form, suing for the same relief in respect of the same subject-matter, the dismission of the former bill may successfully be pleaded in bar of the latter. If the relief which was sought by the present bill is inconsistent with the decree made in the former suit between the same parties, the present bill could not stand. There is no allegation in the second bill of any former decree having been made, of any new matter having been discovered, or of any leave having been given to file a new bill. "A decree or order dismissing a former bill for the same matter, may be pleaded in bar to a new bill, if the dismission was upon hearing, and was not in terms directed to be without prejudice. But an order of dismission is a bar only where the Court determined that the plaintiff had no title to the relief

day of November, 1860, was for. And I further say, that the document alleged and set forth in the paragraph No. 9 of the said bill now being pleaded to, and therein called the draft agreement, is the same document as is alleged and set forth in the said paragraph No. 9 of the said bill of the 3rd day of November, 1860, and therein called the agreement; and that the document alleged and stated in the paragraph No. 21 of the said bill now being pleaded to, and therein called an indenture of lease, is the same document as is alleged and set forth in the paragraph No. 18 of the said bill of the 3rd day of November, 1860, and therein also called an indenture of lease. All such matters and things I aver to be true, and I plead the same in bar to the first above-mentioned bill of complaint, and I humbly demand the judgment of this Honourable Court whether I ought to be compelled to make any answer to the said bill of complaint, and humbly pray to be hence dismissed, with my reasonable costs in this behalf sustained."

The plea was put in on oath, as the non-amendment of the bill did not appear on the record enrolled. "If a cause has been formerly dismissed this Court, but the dismission not signed and enrolled, the plea of such dismission must be upon oath, for, till the enrolment, it is not recorded:" Wyatt's Practical Register, 329; Daniell, Ch. Pr., 3rd ed., 566. The practice is to refer a plea of a decree signed and enrolled, and it is not replied to: Lord Redesdale, 5th ed., 356; Daniell, Ch. Pr., 569.

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sought by his bill:" Mitford's Pleadings (*a*). Again, "If the Court, upon a demurrer, has clearly decided upon the merits of the question between the parties, the decision may be pleaded in bar of another suit" (*b*). Therefore, it is plain that a decision of the Court, dismissing a former bill for the same subject-matter, or a decision of the Court upon a demurrer for want of equity, which is equivalent to a dismission, may be pleaded in bar to a new bill. Again, "No decrees shall be reversed, altered, or explained, being once enrolled, but upon a bill of review; and no bill of review shall be admitted, except it be for error of law, appearing in the body of the decree, without further examination of matters of fact, or new matter be shown which hath risen in time after the decree:" Tothill (*c*). "Decrees are not to be reversed, altered, or explained, being once enrolled, but upon a bill of review" (*d*). "Where causes are dismissed upon full hearing, and the dismission signified by the Lord Chancellor, and enrolled, such causes shall not be retained again; neither shall any new bill be admitted, except it be upon new matter, like unto the case of bill of review. In case of all other dismissions, which are not upon hearing of the cause, if any new bill be brought, the dismission is to be pleaded" (*e*).

[The following cases were also cited:—*Chambers* v. *Greenhill* (*f*), *Rutland* v. *Brett* (*g*), *Denny* v. *Filmer* (*h*), *The Earl of Peterborough* v. *Germaine* (*i*), *Hodson* v. *Ball* (*k*), *Cooper* v. *Lewis* (*l*), *Bainbrigge* v. *Baddeley* (*m*), *Toulmin*

(*a*) 3rd ed., p. 279.
(*b*) Page 255.
(*c*) Page 41.
(*d*) Ibid. 47.
(*e*) Ibid. 50.
(*f*) Rep. in Ch., vol. 2, 42.
(*g*) Finch, 124.
(*h*) 2 Ca. in Ch. 133.
(*i*) 6 B. P. C. 1.
(*k*) 1 Phill. 177.
(*l*) 2 Phill. 178.
(*m*) 2 Ibid. 705.

v. *Copland* (*a*), *Partington* v. *Reynolds* (*b*), *Henderson* v. *Cook* (*c*).]

Mr. *Malins*, Mr. *T. Stephens*, and Mr. *Langworthy*, for the bill, were not heard.

Judgment.

THE VICE-CHANCELLOR:—

The plea is defective. It pleads to this bill an order of Vice-Chancellor Wood, allowing a demurrer to a former bill in respect of the same matter. This order, which allowed the demurrer, also gave the plaintiff leave to amend within fourteen days, and, in default, that the bill should stand dismissed with costs. The effect of the order on that demurrer has been, that the former suit for this same matter is now entirely out of court. The effect of this plea is, that although it states that the bill now filed is for the same matter and sets forth the same documents, it does not aver that the allegations in support of the relief prayed by this bill are the same as the allegations in the former bill. This is a fatal defect. The order allowing the demurrer gave leave to amend the bill; and it is very plain, therefore, that the Court entertained an impression that, if the bill had been differently framed, the plaintiff might have made a case for relief.

The plea must be overruled with costs, one month being allowed to the defendant to answer.

(*a*) 3 Y. & C. 382. (*b*) 4 Drew. 253. (*c*) Ibid. 306.

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Gift by a testator to the children of his late brother John; and in another clause there was a gift to the issue of his said brother. The brother John had only one son, who died in the testator's lifetime, leaving four children. —*Held*, that these four grandchildren were entitled, there being no children.

BERRY *v.* BERRY.

A. H. BERRY, by his will, dated the 16th of September, 1850, gave the residue of his real and personal estate to trustees, their heirs, executors, administrators, and assigns, upon trust to permit his dear wife, the defendant Esther Berry, to receive the rents and profits during her life, and from and after her decease, upon trust to receive the rents, issues, and profits of certain messuages or dwelling-houses, part of the real estate, and to pay the same to his nieces, the defendant Jane Berry Byrnes, widow, and the defendant Mary Berry Herron, wife of the defendant John Herron, in equal shares, during their respective lives, for their respective separate use, and not by way of anticipation; and that, if either of his said nieces should at any time attempt to sell, alien, charge, or incumber in any manner whatsoever the property thereby bequeathed to them, then the share of that niece should be absolutely forfeited; and upon either of the events aforesaid, the testator directed his trustees to apply the rents for the benefit of their children or issue until twenty-one as therein mentioned; and, in case one of them should die without issue, he directed the survivor to receive such rents and profits for her life; and after the decease of the survivor he devised the same messuages or dwelling-houses to their respective issue in equal shares, such issue to take the parent's share only, as tenants in common. And in case both his said nieces should happen to die without issue, he gave and devised the said messuages and dwelling-houses as follows:—

"Unto and equally between and among the children of my late brother John Berry, in equal shares, their

several and respective heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants. And in case my said brother John leaves only one child, then I give and devise the same messuages or dwelling-houses to that only child, his or her heirs, executors, administrators, and assigns."

The testator then went on to direct his trustees to invest 800*l.*, part of his personal estate, upon trust to pay the interest to his niece, the defendant, Maria Berry, during her life, and after her decease to her children in equal shares; and in case his said niece should die without issue, he gave and bequeathed the interest thereof to his said nieces, Jane Berry Byrnes and Mary Berry Herron, during their respective lives, in equal shares, and their issue as therein mentioned; and in case both his said nieces should die without issue, he gave the said sum of 800*l.* as follows, "to the issue of my said late brother, John Berry, in equal shares; and if there be only one child of my said late brother John, I give and bequeath the whole, in the events aforesaid, of the said sum of 800*l.* to such only child, his or her executors, administrators, or assigns." And as to the rest and residue of my personal estate, I give the same "unto and equally between and amongst the children of my late brother, John Berry, who shall be living at the decease of my said wife, and who, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain the said age or marry under that age, to be divided between and amongst the said children, if more than one, in equal shares, and if but one, the whole to be in trust for that one or only child, his or her executors, administrators, or assigns. Provided, nevertheless, and I hereby declare, that in case any objects of the trusts of this my will shall die in the lifetime of my said wife, and if any child or children of such object shall be living at my said wife's

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decease, then the share of the said trust premises to which such object or objects so dying would, in case they had survived my said wife, have been entitled under the trusts aforesaid, shall be held by my said trustees, upon such trusts, and subject to such provisions in favour of the child or children of such objects respectively, as the same would have been held if, as regards such object or objects so dying, such object or objects had died immediately after my said wife."

The testator made two codicils to his will, dated the 22nd of December, 1854, giving certain legacies and appointing another executor, but in all other respects confirming the will, and died on the 1st of November, 1857, leaving no children living, but leaving his widow, and three nieces, Mary Berry Herron, Jane Berry Byrnes, and Maria Berry, him surviving.

The testator's eldest brother, John, died in November, 1820, having had two children, of whom, one, an infant, predeceased her father, and the other, John Warburton Berry, died in 1840, leaving four children, J. J. Berry (the testator's heir-at-law), William Lees Berry, Elizabeth Berry, and Sarah Berry, which latter died without issue, in the testator's lifetime.

The plaintiffs filed this bill to administer the trusts of the will, and prayed that it might be declared that the plaintiffs were entitled, under the description of children of the testator's late brother John, or by way of substitution, to the residue of the testator's personal estate, subject to the life estate given to Esther Berry, and to a contingent interest in the legacy of 800*l.*

Argument.

Mr. *Malins* and Mr. *Bagshawe*, for the plaintiffs, contended that the plaintiffs were entitled under the gift to the children of the testator's late brother. They cited *Stringer* v. *Gardiner* (*a*).

(*a*) 27 Beav. 35.

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Mr. *Bacon* and Mr. *Robinson*, for the defendants Mary Berry Herron and her husband, contended, that it must be presumed that the testator, who well knew the facts of the death of John Berry and John Warburton Berry, must have known what were the contents of his will in 1854, when he made a codicil confirming it: *Gill* v. *Shelley* (*a*). In *Stringer* v. *Gardiner* the bequest was to a person who was named, which was not the case here. It was plain, when the testator gave 800*l.* to the "issue" of his deceased brother, that he knew how to specify the plaintiffs as the objects of his bounty, if he had intended to do so. The plaintiffs were the "issue," but they were not the children of the testator's brother.

Mr. *Elmsley* and Mr. *Milne* appeared for Esther Berry.

THE VICE-CHANCELLOR:—

Judgment.

The case of *Crooke* v. *Brookeing* (*b*) was a decision of the Lords Commissioners. The question there was whether, under a gift to children merely, grandchildren could take along with children. The Lords Commissioners, proceeding on a true principle, said that grandchildren could not take under a gift to children where there were children in existence. But they went on to say, that, if there had been no child, the grandchildren might have taken, in order to prevent a total failure of the gift. This, however, is a mere *dictum*.

In the case of *Reeves* v. *Brymer* (*c*), Lord Alvanley says, that "children" may mean grandchildren where there can be no other construction, but not otherwise. That is exactly this case. It is true that that is only a *dictum* of Lord Alvanley, but it is in accordance with the *dictum* of the Lords Commissioners in *Crooke* v. *Brookeing*. Sir

(*a*) 2 R. & M. 336. (*b*) 2 Vern. 106. (*c*) 4 Ves. 698.

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William Grant, in the case of *Radcliffe* v. *Buckley* (*a*), approves the law as stated in the *dicta* of the eminent judges above referred to. He says (*b*), "It is not contended that the description 'children,' ordinarily and properly speaking, comprehends grandchildren. It was decided in the case referred to, *Crooke* v. *Brookeing*, that, if there were children, grandchildren could not take with them a legacy given to children. The decision of the Lords Commissioners in that case was approved by Lord Northington in *Hussey* v. *Dillon* (*c*), and was not disputed by Lord Hardwicke in *Wythe* v. *Blackman* (*d*); and Lord Alvanley's declaration that 'children' may mean grandchildren where there can be no other construction, but not otherwise, is consistent with and founded upon that case." Upon the doctrine stated by the Lords Commissioners, the opinions of Lord Alvanley and Sir William Grant approving that rule of construction, I feel bound to hold that the brother's grandchildren are entitled. But it would not rest there; for in that part of the will which gives a sum of 800*l.*, the testator speaks, not merely of the children of his late brother John Berry, but of "the issue" of his late brother John Berry. The word "issue" certainly includes grandchildren, and shows that they were objects of the testator's bounty. Therefore, I think, the decree must be in favour of the grandchildren.

(*a*) 10 Ves. 195.
(*b*) 10 Ves. 201.
(*c*) Ambl. 603.
(*d*) 1 Ves. 196; Ambl. 555; reported in Ambler as *Wythe* v. *Thurlston*.

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Devise to trustees of freehold premises, on trust to pay the rents to P., for life, and, after her decease, on further trust for such person or persons, being a child or children of P., as she should by will appoint; and in case P. die, without leaving children her surviving, or in default of appointment, or so far as such may not extend, on trust for M., in fee. P. died, leaving children, but without appointing.—*Held*, M. entitled.

SARAH DRAPER, by her will, dated the 15th of January, 1827, after directing all her just debts, funeral and testamentary expenses, to be fully paid and satisfied, devised to Thomas Ayres and George Goldring a freehold house, garden and premises, to hold to them and their heirs, upon trust to receive the rents and profits, until her grand-niece, Mary Ann Parslow, then living with her, should attain the age of twenty-one years, and pay and apply the same towards the maintenance, education and advancement of Mary Ann Parslow; and from and after the said Mary Ann Parslow should attain the age of twenty-one years, upon trust to permit and allow her to receive the rents for her own proper use and benefit during her life, her receipt and receipts to be the only proper discharge and discharges for the same; and that the same should not be sold, disposed of, or anticipated, but paid into her proper hands, when due and liable, free from the debts and liabilities of any husband with whom she might intermarry: "And from and after the decease of her, the said Mary Ann Parslow, upon further trust for such person or persons (being a child or children of her, the said Mary Ann Parslow) as she, the said Mary Ann Parslow, shall or may by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be signed, sealed, published, and declared by her, the said Mary Ann Parslow, in the presence of and to be attested by three or more credible witnesses (notwithstanding any future coverture), direct, limit, or appoint, give or devise the same; and in

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case of the decease of the said Mary Ann Parslow, without leaving such child or children her surviving, or in default of such direction, limitation, or appointment, gift or devise as aforesaid, or so far as the same if incomplete shall not extend, upon trust for my nephew, John Mayo, the son of my late brother, John Mayo, his heirs and assigns for ever." The testatrix then devised the residue of her property, estate, and effects to the trustees, upon trust to convert into money and let the same accumulate until Mary Ann Parslow attained twenty-one, and then pay the same to her for her absolute use and benefit.

Sarah Draper died in 1828. On the 1st of December, 1839, Mary Ann Parslow married the defendant John Henry Inwood, by whom she had fourteen children, of whom six died in her lifetime and one after her decease. On the 31st of January, 1860, she died intestate, without ever having exercised the power of appointment. There were living seven children of Mary Ann Parslow, of whom James Inwood was her heir-at-law.

The bill was filed by the representative of the trustees and executors, to have the rights of the parties declared, against the husband and children of Mary Ann Inwood, and also against John Mayo, who, in consequence of advertisements published by the trustees, had claimed to be entitled to the property as in case of default of appointment.

The husband claimed to be tenant by the courtesy; James Inwood, the heir-at-law, claimed as tenant in tail.

The bill submitted that there ought to be an inquiry whether Mary Ann Inwood had exercised the power of appointment; but it was admitted at the bar, that there had been no appointment.

Argument.

Mr. *G. W. Collins* appeared for the trustees, and sub-

mitted to the Court to declare the rights of the defendants.

Mr. *Greene* and Mr. *De Longueville Giffard*, for all the defendants:—

Upon the true construction of the will, there was an implied gift to the children of the testatrix's niece.

In *Harding* v. *Glynn* (*a*), the testator gave to his wife, Elizabeth, all his estates, leases, and interest in certain houses, and all his goods of which he was possessed; and he desired her, at or before her decease, to give the same to such of his own relations as she should think most deserving. And it was held by the Master of the Rolls, that such of the household goods as remained in specie, and undisposed of, ought to be divided among the testator's next of kin at the decease of the wife.

In *Brown* v. *Higgs* (*b*), the testator gave a leasehold estate to one, subject to certain charges, on trust, as to the residue of the rents, for the children of Samuel Brown, as John Brown should think most deserving and likely to make the best use of it, or to the children of his nephew, Samuel Brown, if any such there should be. John Brown having died intestate, in the lifetime of the testator, the Master of the Rolls held, that, on the fair construction of the will, the testator intended the property to go to the children; and that the power of appointment was merely a power to appoint some and exclude others; and that the meaning was, in default of appointment, that all the children should take. The Master of the Rolls decided, that it was within the principle of *Harding* v. *Glynn*, and, if none were more deserving than another, it was a gift to all.

In *Kennedy* v. *Kingston* (*c*), Sir Thomas Plumer, in a

(*a*) 1 Atk. 469. (*b*) 4 Ves. 708. (*c*) 2 J. & W. 434.

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similar case, said, "The power must be tacitly understood as tacitly including a provision for an equal division of the fund among all the objects, in the event of no appointment being made."

Secondly. If the Court should hold that there was no gift by implication to the defendant, it was submitted that these words created an estate tail: *Doe* dem. *Cole* v. *Goldsmith* (*a*).

Thirdly. If neither of these was the true construction, it was submitted the gift was void, and the property passed under the residuary gift.

Judgment.

THE VICE-CHANCELLOR:—

The case is one of great hardship, but the language of the will is perfectly plain. First, there is a life-estate to Mary Ann Inwood for her separate use; then a power of appointment to her amongst her children. Then there is a direction that, in default of children, or in default of appointment, or so far as any appointment shall fail of being complete, the property is to be taken by John Mayo, the nephew, in fee, to him, his heirs and assigns. There is no gift at all to the children. The language of the will is as plain as can be, that no child is to take except by virtue of the appointment of the mother. Indeed, the counsel for the defendants, though they claim as children, could not exclude this, as a clear construction, that, if there were fourteen children, and there had been an appointment of one-fourteenth to one child alone, and the remaining thirteen-fourteenths had been unappointed, the other children could have taken nothing; and that, by the express language of the will, the thirteen-fourteenths unappointed would have gone over to John Mayo in fee.

It is equally clear that there was no appointment, at least

(*a*) 7 Taunt. 209.

none has been produced; and, in the clearest language that can be used, in the event of no appointment or of an incomplete appointment, the property is to go over. The case of *Brown* v. *Higgs* has been cited to show that this power was in the nature of a trust. But the case of *Brown* v. *Higgs* can have no application where there is a gift over in default of appointment, and where there has been a default of appointment. Therefore it is that, with great regret, I must hold that there was no gift at all, express or by implication, to these children; and they could only have taken by virtue of an appointment.

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June 10*th*.

Judgment, entered up in 1852 on a warrant of attorney of the same date, bearing an indorsement that the said warrant was given to secure 4500*l*., with interest at 10 per cent., provided that any equitable charge which the creditor might have on the lands of the debtor by registering the judgment should not be relinquished by taking the debtor into execution.—*Held*, that the judgment was not void on the ground of usury.

BOUGHTON *v.* JERVIS.

THE bill was filed by Sir Charles Boughton, Bart., and Mr. C. S. Dickson, as mortgagees, to enforce their mortgage security on the property of Sir Sandford Graham.

On the 21st of January, 1860, the usual inquiry was directed as to the mortgages and incumbrances on the freehold and leaseholds in the bill mentioned, and also of the priorities.

By a certificate, dated the 3rd of July, 1860, the chief clerk certified that the real and leasehold property had been sold and produced 33,000*l*., which had been paid into court; that the plaintiff's claim for principal, interest, and costs amounted to 21,000*l*., leaving a balance in court, but not enough to pay the first four incumbrancers.

The fifth incumbrancer now moved to vary the certificate, by omitting the first, third, and fourth incumbrances, on the ground that they were void as being usurious.

The first incumbrance was a judgment entered up in the Court of Queen's Bench, dated the 18th of June, 1852, on a warrant of attorney, dated four days previously, and registered at Wakefield on the 23rd of June. The chief clerk certified that there was due on the judgment the sum of 4548*l*. 7*s*. 5*d*., and interest thereon at 4 per cent. from the 5th of February, 1851. The gross sum was made up of principal, interest at 10 per cent., and costs, after giving credit for certain payments which had been made. On the warrant of attorney there was the following indorsement:—

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"Memorandum.—The written warrant of attorney is given to secure the payment by the within-named Sandford Graham, his heirs, executors, or administrators, unto the within-named Swynfen Jervis, Henry Urmston Thompson, and Sir William Henry Dillon, or the survivors or survivor of them, his executors or administrators, on the 14th day of December next ensuing, the date of the said warrant of attorney, the payment of the sum of 4500*l.*, together with interest thereon from the date of the said warrant until the said sum of 4500*l.* and every part thereof shall be fully paid, after the rate of 10 per cent. per annum, and certain premiums of life assurance hereinafter mentioned, which sum of 4500*l.* hath this day been advanced by the said Swynfen Jervis, Henry Urmston Thompson, and Sir William Henry Dillon, unto the said Sandford Graham, on security as well of the written warrant of attorney as of the deposit of a policy of assurance effected by the said Sandford Graham on his own life, in the Albert Life Assurance Company for 4500*l.*, at and under the half-yearly premium of 51*l.* 7*s.* 6*d.*, which policy bears even date with the said warrant, and is numbered 1635. And it is hereby agreed and declared, that no execution shall issue upon the judgment to be entered up in pursuance of the within-written warrant of attorney, unless and until default be made in the payment of the said sum of 4500*l.*, or the interest thereof, after the rate and at the time aforesaid, or of some part thereof respectively, or in keeping on foot the said policy of assurance. But if any such default shall be made, it shall be lawful for the said Swynfen Jervis, Henry Urmston Thompson, and Sir William Henry Dillon, or the survivors or survivor of them, his executors or administrators, to sue out one or more writ or writs of execution upon the said judgment, and either against the person or goods of the said Sand-

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ford Graham, and either concurrently or otherwise, and pay the whole of the said sum of 4500*l.*, or so much thereof as shall then remain unpaid, together with interest thereon, after the rate aforesaid, to the day of the actual payment of the whole of the said sum of 4500*l.* to the said S. Jervis, H. U. Thompson, and Sir W. H. Dillon, the survivors or survivor of them, his executors or administrators, any rule or practice to the contrary notwithstanding, and also all and every sums and sum of money that may have been paid by the said S. Jervis, H. U. Thompson, and Sir W. H. Dillon, or the survivors or survivor of them, his executors or administrators, for keeping on foot the said policy of assurance, which they and he are hereby empowered to do, so long as the said sum of 4500*l.*, or the interest thereof, or any part thereof respectively, shall be owing to the said S. Jervis, H. U. Thompson, and Sir W. H. Dillon, or the survivors or survivor of them, his executors or administrators; but it shall not be obligatory upon them or him to exercise such power (but the total amount of moneys to be ultimately recoverable by virtue of the within warrant of attorney is not, together with the said principal sum of 4500*l.*, to exceed the sum of 5000*l.*), and together also with costs as between attorney and client, sheriff's poundage, officers' fees, and all other incidental expenses. And it is further agreed, that any equitable or other charge or security which the said S. Jervis, H. U. Thompson, and Sir W. H. Dillon, or the survivors or survivor of them, his executors or administrators, may acquire or claim to be entitled to, upon or over the estates, lands, tenements and hereditaments of the said Sandford Graham, by means of the registry of the said judgment in the Common Pleas, shall not be deemed or taken to be relinquished in case the said S. Jervis, H. U. Thompson, and Sir W. H. Dillon, and the survivors or survivor of them, his executors or administrators, shall

cause the person of the said Sandford Graham to be taken or charged in execution, any law or usage to the contrary notwithstanding. And that it shall not be necessary for the said S. Jervis, H. U. Thompson, and Sir W. H. Dillon, or the survivors or survivor of them, his executors or administrators, to sue out any writ of *scire facias*, or do any other act to revive the said judgment, although no prior proceedings shall have been had or taken for the space of one year previously to the issuing of such execution; and that no writ of error shall be brought, or bill in equity be filed, or any advantage taken by the said Sandford Graham, his heirs, executors, or administrators, for or on account of the premises, or for or on account of any other matter whatsoever in anywise relating thereto, or to any other proceedings whatsoever, which may be taken on the said judgment or execution, in order to carry out the true intent and meaning of these presents."

The third and fourth incumbrances set forth in the schedule were judgments entered up in the Court of Queen's Bench, on the 7th and 16th of November, 1852, respectively, on warrants of attorney, dated the 19th of July and the 29th of September, 1852, on which were indorsements similar to those mentioned above.

The principal evidence relied on was the answer of the defendants Jervis, Thompson, and Dillon, from which the following passage was read:—

"We have been informed, and believe it to be true, though we have no personal knowledge of the fact, that before any money was advanced by us on the security of the said warrants of attorney of the 14th of June and the 29th of September, 1852, Alfred Rogers, who acted as the solicitor of the defendant Sir S. Graham, did furnish George Goldsmith Kirby, who acted as our agent, with a rough statement in writing of certain freehold and leasehold estates at

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Kirkstall, in the county of York, to which the defendant S. Graham represented himself to be entitled in remainder in fee expectant on the death of Sir Sandford Graham, deceased; and we also admit that such declaration was called for and required with a view to the advances we were then about to make, and which we did afterwards make to the said defendant, and in order that we might be satisfied that the said estates in the counties of York and Warwick were a sufficient security for the advances, if we should be compelled or advised to resort thereto; and we also admit, that the said G. G. Kirby did stipulate on our behalf that the security for the said advances should be effected by means of warrants of attorney, upon which judgments should be forthwith entered up and registered, so as to be a charge upon the said real estates of the said defendant.

Argument.

Mr. *Bacon* and Mr. *Osborne* appeared for the plaintiffs.

Mr. *Baggallay* and Mr. *G. L. Russell* in support of the summons:—

It was clear from the answer of the defendants, and the terms of the defeasance indorsed on the warrant of attorney, that there had been an arrangement to evade the operation of the usury laws. It must, therefore, be assumed that the object of the warrant of attorney and the defeasance was to secure more than the legal interest, and the transaction was usurious.

The Act of Anne (passed in 1714) remained in force until the 17 & 18 Vict. c. 90, which repealed the usury laws, still in express terms reserving all rights and liabilities in existence before the date of the Act.

A warrant of attorney, to confess judgment, given for the purpose of enabling a creditor to enter on the

land which the defendant had covenanted not to assign, was held a breach of the covenant: *Doe* dem. *Mitchison* v. *Carter* (*a*).

Again, where a grantor of an annuity, secured on a rectory, gave a warrant of attorney in order to entitle the annuitant to obtain sequestration, it was held void, as creating a charge on a benefice: *Flight* v. *Salter* (*b*).

In like manner, where a loan of money, at more than legal interest, was secured by a warrant of attorney by a lease, the Court held that they were not within the 3 & 4 Wm. 4, c. 98, s. 7, or the 1 Vic. c. 80, which excepted notes and bills from the usury laws, because the deposit of the lease was the real security; and the warrant of attorney and the promissory note were only ancillary: *Berrington* v. *Collis* (*c*). [*Lane* v. *Horlock* (*d*), *Croft* v. *Lumley* (*e*), *Bond* v. *Bell* (*f*), *Ex parte Boyle* (*g*), *Johnson* v. *Holdsworth* (*h*), were also cited.]

Argument.

Mr. *Malins*, Mr. *M. Emsley*, Mr. *Craig*, Mr. *Greene*, Mr. *Tripp*, Mr. *Jervis*, Mr. *C. Hall*, Mr. *Swanston*, and Mr. *Bacon*, jun., appeared for the different parties, but were not called on.

THE VICE-CHANCELLOR:—

This case is really governed by the case of *Lane* v. *Horlock*, and no one can read Lord Brougham's judgment (page 603) without seeing that it disposes of this case. The certificate, therefore, will stand, and the summons be dismissed, with costs as to all the incumbrancers prior to the party who has made the application.

Judgment.

(*a*) 8 T. R. 300.
(*b*) 1 B. & Ad. 673.
(*c*) 5 Bing. N. R. 322; s. c. 7 Scott, 302.
(*d*) 5 Ho. Lds. Ca. 80—596.
(*e*) 6 Ibid. 739.
(*f*) 4 Drew. 157.
(*g*) 3 De G. M. & G. 515.
(*h*) 1 Sim. N. S. 106.

1861.

June 6th.

LUCAS *v.* WILLIAMS.

A promissory note, given to a creditor by one of the executors in the name of the testator's firm, while the executor was carrying on the business pursuant to directions in the will, but was ignorant that the estate was insolvent —*Held*, personally binding on the executors.

THIS was a motion on behalf of Ann Brinkwell Williams and William Williams, for an injunction to restrain John Williams, of Ludlow, from further prosecuting an action commenced by him in the Exchequer, against A. B. Williams, F. J. Williams, and W. Williams, to recover 605*l.* 13*s.* 5*d.* as a debt due from James Williams, the testator in the cause.

The testator carried on business as a factor at Birmingham, and was supposed to be a man of considerable wealth.

By his will, made the 14th of August, 1860, he appointed his wife, A. B. Williams, T. J. Williams, and W. Williams, his executrix and executors. He died on August 17, 1860, and all his executors proved the will.

The will directed his executors to carry on the business.

W. Williams, at the date of the testator's death, was in his employment, and continued after the testator's death to carry on the business under the same style and name, but without any authority from his co-executrix or co-executor so to do, neither of whom interfered in the business.

At his decease, the testator was indebted to John Williams, of Ludlow, in the sum of 600*l.* A few days after the testator's death, a letter was received from Mr. Weyman, of Ludlow, solicitor of Mr. John Williams, asking for payment of the 600*l.*

William Williams, believing the assets sufficient, requested the testator's widow to write to Mr. Weyman, to ask for time for payment, and to offer to pay 300*l.* in four months and 300*l.* in eight months.

The affidavit stated, that, in making such offer, neither W. Williams nor the widow had the remotest idea of pledging themselves to such payments, but they believed

that the assets were sufficient. Mr. Weyman accepted the offer, but did not in any manner express his wish or expectation that the executors of the testator should become personally liable for the debt of 600*l.*

John Williams, accordingly, sent him two promissory notes, in the following forms:—

"£300. "Birmingham, September 8th, 1860.

"Four months after date, we promise to pay to the order of Mr. John Williams three hundred pounds, value received.

"*per pro.* Jas. Williams & Co.
"W. WILLIAMS.

"At Messrs. Jones, Lloyd, & Co., Bankers, London."

W. Williams deposed, that he had no express or implied authority from Ann Brinkwell Williams and Thomas James Williams to make them personally liable on the notes, but that he signed them as a matter of course in obtaining payment of the notes at the bankers', and because he was in the habit of signing bills and notes in the trade carried on by him as aforesaid in that name or style of the firm. That he acted therein *bonâ fide*, in the belief the estate of the testator was sufficient.

In September, he discovered that the estate was insolvent. The suit of *Lucas* v. *Williams* was instituted by a creditor to administer the testator's estate, and the usual decree made on the 10th of November, 1860; but the creditor, J. Williams, had not gone in to prove under that decree, but commenced an action on the notes against the executors.

The executors were also sued on other notes given in the same way.

The question now was, whether, having regard to the circumstances under which the notes were given, the executors were liable.

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Mr. *Archibald Smith* appeared for the plaintiff in the suit.

Argument.

Mr. *G. L. Russell* for the executors, submitted the point to the Court.

Mr. *Eddis* appeared for the creditor.

Judgment.

THE VICE-CHANCELLOR:—

This is a hard case, but, looking at the course of dealing pursued by the executors, it is impossible to hold that they are not liable on these notes.

June 20th.

Re THE TRUSTEES RELIEF ACT.
Re PELL'S TRUSTS.

Gift by a testator of personal estate to his wife for life, remainder between and among his seven children by name, or such of them as should be living at his wife's decease, and the issue of such as should be dead leaving issue, with power to apply the presumptive share of such issue for maintenance.

THOMAS PELL, the testator, by his will, dated the 18th of December, 1836, gave his residuary personal estate to trustees, in trust to sell and invest the proceeds, and pay the interest to his wife for life, and after her death he directed the principal to be divided as follows: "Unto, between, and amongst my seven children, Elizabeth, now the wife of John Bradshaw, John Pell, Mary, now the wife of Francis Kilbourn, Ann, now the wife of George Mobbs, Samuel Pell, Sarah, now the wife of Robert Frisby, and George Pell, or such of them as shall be living at the decease of my said wife, and the issue of such of them as shall be then dead, leaving issue,

A son of the testator died after his father's death, leaving an infant daughter, who died in the lifetime of the testator's widow.—*Held*, that such infant took a vested share.

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share and share alike, but such issue respectively not to have or be entitled unto a larger share or proportion of such moneys amongst them, than their parent or respective parents would have been entitled to if living.

"And I also empower my said trustees, if occasion shall require, to pay and apply any part or parts, not exceeding altogether one-half of the capital, of the vested or presumptive share or shares, of any one or more of my said deceased children, of and in the moneys aforesaid, during their minority or respective minorities, for his, her, or their respective advancement in the world."

Statement.

The testator died on the 8th of January, 1837, leaving his widow and seven sons him surviving.

John Pell, one of the sons, died in May, 1840, leaving a widow, Ann Pell, and one infant daughter. The infant died about six weeks after her father. The testator's widow, Mary Pell, died on the 5th of October, 1859.

The widow of the son married William Goodey.

The question was, whether the infant took a vested interest in the fund, which had been paid into court, or whether the interest was contingent on surviving the death of the tenant for life. The question was raised by a summons in chambers, which had been adjourned into court.

Argument.

Mr. *Boys*, in support of the summons, contended that, on the language of the will, the gift vested only in the issue living at the death of the tenant for life: *Macgregor* v. *Macgregor* (*a*), *Bennett* v. *Merriman* (*b*), *Penny* v. *Clarke* (*c*). The whole scope of the will was contingent, and the testator, by using the word "presumptive," indicated that there was a contingency.

Mr. *Peck*, for Mr. and Mrs. Goodey, was not heard.

(*a*) 2 Coll. 192.
(*b*) 6 Beav. 360.
(*c*) 29 L. J. 370, 21st Feb. 1861.

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Re THE TRUSTEES RELIEF ACT. *Re* PELL'S TRUSTS.

Judgment.

THE VICE-CHANCELLOR:—

The interest is clearly vested; and there must be a declaration accordingly.

June 25th, 26th, 27th & 29th; July 1st & 2nd.

A voluntary deed, whereby an aged and infirm though not incapable donor made an immediate gift of her whole property, without power of revocation, and without sufficient evidence that she fully understood the effect of the instrument, set aside after her death, at the instance of the heir-at-law.

ANDERSON *v.* ELSWORTH.

THIS bill was filed by certain persons claiming to be devisees, and one of them heir-at-law, of Mrs. Elizabeth Marston, and it prayed as follows: "That the deed executed by the said Elizabeth Marston, under the circumstances in the bill mentioned, and expressed to be dated the 3rd of January, 1859, might be set aside and delivered up to be cancelled; and that, if necessary, the defendant Mary Elsworth might be decreed to convey all the real estates of the said Elizabeth Marston, deceased, to the several persons to whom the same were devised by the said will of the said Elizabeth Marston, in the shares and manner in the said will mentioned."

The bill also prayed for an injunction and a receiver.

The bill alleged, that Mrs. Marston at the time of making her will, was entitled, under the will of her late husband, to a dwelling-house and farm lands at Kearby-cum-Netherby in the parish of Kirkby Overblow, in the county of York, one moiety of which she held for the life of one Peter Houghton, and the other in fee. After the death of her husband, she occupied the farm and dairy. Her brother, John Anderson, was entitled to the remainder in fee of the one moiety, and died, leaving a son, who was his heir. Elizabeth Marston retained possession of the entirety after the death of Houghton, in 1855, in the belief that she was entitled to the whole,

no claim being made in respect of the rents and profits after Houghton's death.

In 1843, Elizabeth Marston employed as her solicitor, Mr. Clayton, of Netherby, to prepare her will, dated the 12th of January, 1853, whereby, after directing all her just debts, &c., to be first paid out of her personal estate, and if the same should be insufficient, then out of the rents and profits of her real estate, she gave and devised unto all and every the child and children of her brother John Anderson, one undivided third part or share of and in all and every the said dwelling-houses, lands and hereditaments; to hold the same undivided third part or share unto all and every the children of her brother John Anderson, in equal shares, as tenants in common; and as to another undivided third part or share in the said hereditaments, she devised the same to all and every the child and children of her brother George Anderson, in equal shares, as tenants in common; and as to the remaining third part or share in the said hereditaments, she devised the same to all and every the child and children of Isaac Normington, in equal shares as tenants in common. She then gave and bequeathed the residue of her real and personal estate in three equal shares to the same persons; and appointed her nephews, John Anderson, Thomas Anderson and Isaac Normington, joint executors of her will.

The will was attested by Mr. Clayton and his clerk.

The bill alleged that, some time after the date and execution of the said will, Elizabeth Marston "fell into a state of infirm health and great debility," and that in the month of March, 1858, when she was residing at the house of Isaac Normington, she was in a state of mental imbecility, and was generally unconscious and unable to recognise the persons who were about her.

In April, 1858, she expressed a wish to go to the house of her niece, Mary Elsworth, at Harrogate.

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Mrs. Normington accordingly sent her to Harrogate, and from that time she remained there until her death, on the 29th of January, 1860.

On the 3rd of January, 1859, she executed the deed of gift of the whole of her property to Mary Elsworth, without power of revocation, which was registered at Wakefield.

The bill alleged that Mary Elsworth, under that deed, entered into and still was in possession of the real estate; that the plaintiffs never heard of any such deed during the lifetime of Mrs. Marston, and the fact of its execution was kept concealed from them. It remained in Mary Elsworth's possession; and on the day of the funeral of Elizabeth Marston, the plaintiffs and defendants, and other persons who had been attending the funeral, being together at an inn at Kirkby Overblow, Mr. Peter Taylor, of Knaresborough, solicitor, produced a document, and stated that Elizabeth Marston had not left a will, as she had not anything to make a will of. He then proceeded to read the document, which appeared to be a conveyance of all the real estate of the said Elizabeth Marston to the defendant Mary Elsworth, for her own absolute use. The plaintiffs expressed great surprise, in answer to which the said Mr. Taylor stated that it had met with Mrs. Marston's approbation; that the said Mary Elsworth then left the room; no other explanations were given; and the plaintiffs had never seen a copy of the deed.

Peter Taylor, the solicitor who prepared the deed, deposed that he acted as Elizabeth Marston's solicitor since September or October, 1857.

He admitted that the first occasion on which he so acted was in the year 1857; that several times in the latter part of the year 1857, Mrs. Marston came to his house about the sale of a piece of land. On the first of these occasions she remained three or four hours, and during the greater part of that time was in the room of

his housekeeper, Jane Crawford, with whom she dined and conversed. On the 23rd of December, 1857, she duly executed the deed of conveyance of this piece of ground, and received the purchase-money for the same. She herself assisted in settling the accounts, and though untidy in her person and dress, was then of perfectly sound mind, memory, and understanding. In the latter end of December, 1857, Mrs. Marston again called at deponent's office to fetch away some title-deeds which he delivered to her personally. Deponent did not see her again till the latter end of 1858. On the 31st of December, 1858, he saw her, he believed, at her own request, at Mary Elsworth's house. On that occasion he was struck with the improvement in her personal appearance, as she was then very clean and neatly dressed, and appeared much stouter in her person, and in very good health. Deponent further said that, no one being present at the interview, Mrs. Marston told deponent that she had sent for him, as she was desirous of making some final disposition of all her property (which consisted of certain freehold lands, situate at Kearby-with-Netherby) in favour of the defendant Mary Elsworth—giving him, as a reason, that Mary Elsworth had always behaved with the greatest kindness and affection to her, and that she was really indebted to Mary Elsworth for her improvement in her personal appearance and dress, and the comfortable home she was enjoying. She further said, that her other relations had deserted and neglected her, and that she was determined not to leave them any of her property. Elizabeth Marston then asked him what would be the difference between the expense of a will and of such a deed as would be required in order to carry out the intentions she had expressed to him. He explained to her, that though the original expense of preparing a will would be less than that of a deed, yet that the expense of proving the will, added to the original expense, would be nearly as

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great as the expense of a deed. Elizabeth Marston then asked what would be the effect of a deed of conveyance, and whether the execution of a deed of conveyance would have the effect of revoking any will she might have previously made. In reply, he explained to her fully the effect of the execution of such a deed, and that it would have the effect of revoking any previous will so far as it affected the same lands. He further explained to her, that a deed when once executed would be irrevocable, and could not be altered or varied in the same manner that a will could. After this full explanation, Elizabeth Marston told the deponent that she would execute a deed of conveyance of the lands to Mary Elsworth, instead of devising them by will, and gave him instructions to prepare such a deed. Accordingly, he prepared the draft of such a deed, which he read over and fully explained to Mrs. Marston, who understood and approved of it. An engrossment was prepared, and on the 3rd of January, 1859, Elizabeth Marston came to deponent's office, in Knaresborough, with Mary Elsworth, and deponent then called into his room Jane Crawford, his housekeeper—who had previously seen Mrs. Marston in the year 1857—in order that she might see her. He also called in his clerk, Mr. Turner, in order that he might be present, and read over the deed, and witness the execution. Mr. Turner read over the deed to Mrs. Marston in the presence of Mary Elsworth, Jane Crawford, and the deponent, which was the same deed as that produced; and afterwards deponent fully explained to Mrs. Marston its effect, and that she could not change her mind and alter the deed after she had executed it. She clearly understood the effect of the deed, and expressed satisfaction at being able to execute it and dispose of her property in favour of Mary Elsworth, and thus carry out the intention she had long had. She particularly asked if deponent had made all safe and

secure. She then executed the deed, and it was attested by deponent and his clerk. Deponent further said that Mrs. Marston's bodily health was very good, and that she was, as he verily believed, during the whole time he was acquainted with her, of sound mind, memory, and understanding, and perfectly competent to manage her own affairs.

In cross-examination Mr. Taylor deposed, that Mrs. Marston, about the 9th of December, 1857, was advised by him and Mr. Prest, solicitor, to make a will or declaration that John Anderson, her brother, had no interest in the property; but she declined to do so. Mr. Taylor prepared a draft of a will, but when he saw her again, she said she had given him no instructions to prepare it, and refused to allow him to read it to her. He prepared it on what she had said before, about dividing her property equally among her relations. She never knew the contents of the draft he prepared. He thought she said something about a will she had previously made, and he believed she named Mr. Clayton as having made it; but she said that she intended to alter that materially. When Elizabeth Marston executed the deed of the 3rd of January, 1859, Mr. Taylor placed his hand upon hers, at her request, to steady it, and she wrote her name without any difficulty. She then sealed and delivered the deed, and said she thanked God that she was in such good health and spirits to carry out the intention she had long entertained. Witness called his housekeeper, Jane Crawford, into the room, to see the improvement in the health and appearance of Mrs. Marston, which was so astonishing that he wished her to see it. Mrs. Marston signed the memorial for registration. Witness mentioned the circumstance of Mrs. Marston having executed the deed to many persons whom he named; he made no secret of it.

Mrs. Crawford, the housekeeper, and Mr. Turner, Mr.

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Taylor's clerk, confirmed generally the above evidence. Mr. Prest, a solicitor, who was present on two occasions at Mr. Taylor's office, deposed, that on both occasions he saw and conversed with Mrs. Marston, and from the way in which she completed her business, he believed her to be a very shrewd and careful woman, of perfectly sound mind, memory, and understanding.

The evidence was very voluminous. On behalf of the plaintiffs, several witnesses deposed as to the finding of the will among the papers of Elizabeth Marston's solicitor, Mr. Clayton, deceased; and numerous others as to the mental and bodily condition of Elizabeth Marston.

Isaac Normington, and Dorothy, his wife, deposed that when Mrs. Marston visited their house, in March, 1858, her habits were those of an imbecile person, and her memory appeared to have quite failed. Mr. Scatchard, of Boston Spa, a medical gentleman, who was called in to see her during this visit, said he found her in a state of imbecility both of body and mind; that she was quite like a child; that he did not give her any medicines, as he considered that no medicines would be of service to her, being of opinion that the state she was in was consequent upon old age. He said also that she was not suffering from any illness. Jane Fawcett, who attended on Elizabeth Marston whilst she was staying with Mr. and Mrs. Normington, said she never took the least notice of anything. In March, 1858, she went to Harrogate, in the care of the defendant Mary Ann Bellwood. The defendant John Bellwood, husband of the last-mentioned defendant who also refused to join as plaintiff, supported the plaintiff's case. He deposed that Mrs. Marston was in a very weak state of mind and body, and was incompetent to manage her own affairs. Finally, Thomas Elsworth, the father of the defendant Mary Elsworth, also supported the case of the plaintiffs, and said that

from February, 1858, up to the time of her death, Elizabeth Marston was in a very weak and silly state, both of body and mind.

On behalf of the defendant, fifteen witnesses deposed as to her state and condition, four of whom knew Mrs. Marston for many years before and up to her death. All said that she was of sound mind, memory, and understanding, of good bodily health, and perfectly competent to manage her own affairs. Mr. Bainbridge, of Harrogate, surgeon, deposed that on the 24th of November, 1859, he was called in to see her, and that he found her labouring under an attack of paralysis, which affected her hearing, but that her sanity of mind was unimpaired.

The bill charged that "The execution of the said deed by the said Elizabeth Marston was obtained by the defendant Mary Elsworth, and her said husband, Joseph Elsworth, after the said Elizabeth Marston had gone to Harrogate, as aforesaid, and while she was residing there with the last-named defendant; and at the time of the execution thereof, the said Elizabeth Marston was unable to read or write, and she was in such a state of bodily infirmity and mental incapacity as aforesaid, and wholly unable to understand the meaning or effect of any deed or other document, or any matter of business; and she could not have been, and was not, in fact, aware of what she was doing, or of the object, meaning, purport, or effect of the said deed, when she executed the same."

That, under the circumstances before stated, the said alleged deed was not really the deed of the said Elizabeth Marston, or binding upon her; that, under and by virtue of the said will, the plaintiffs were entitled to one-third of the aforesaid hereditaments and of all other the real estate of the said Elizabeth Marston; or, if the said will had been destroyed and could not now be established, then the plaintiff, Thomas Anderson, as heir-at-law of Elizabeth Marston, was entitled to the whole of the real

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estate, and he was willing and thereby offered to confirm the said will, and, so far as he was able, to give effect to the same. Further, that the deed so executed by the said Elizabeth Marston, under the circumstances hereinbefore mentioned, ought to be set aside; and, having regard to the registration thereof, and the same being a cloud upon and affecting the title to the said hereditaments and other the real estate of the said Elizabeth Marston, the defendant Mary Elsworth ought to be decreed to convey all such real estate to the persons to whom the same was expressed to be devised by the said will in the manner mentioned in the said will.

Mary Elsworth, by her answer, admitted that she had heard Elizabeth Marston say that a will had been prepared for her by a Mr. Clayton, who was, at one time, her solicitor, but alleged that she, the defendant, had never seen the said will, nor did she know what were its contents. She said that Elizabeth Marston was, in 1843, of sound mind, memory and understanding, and that she so continued up to the time of her death. She further said that Mrs. Marston, after the death of her husband, continued the management of the lands and hereditaments at Kearby-cum-Netherby, and also of a certain farm which she held upon lease from the Earl of Harewood; and, being a person of great shrewdness and personal activity, she superintended all the farming operations, particularly the dairy, and was in the constant habit of attending the market at Netherby for buying, and of Leeds for selling, butter. That in 1857, she determined to give up farming, and surrendered the lease which she held from the Earl of Harewood. She let the farm at Kearby to defendant's husband, Joseph Elsworth. After giving up her business, she continued to reside in her own house at Kearby, until February, 1858, when she finally left it and came to reside with the defendant Mary Elsworth, at Harrogate. She con-

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tinued to reside with defendant until March, 1858, when she went to Clifford to visit her sister, Dorothy Normington. She remained with Dorothy Normington only for a short time, and, after an absence of twenty-four days only, she returned to defendant's house at Harrogate, where she remained till her death. After her return, she complained of the treatment she had met with at Dorothy Normington's. During her residence with the defendant, she was at all times of perfectly sound mind, memory, and understanding, of good bodily health, and fully competent to manage her own affairs. In the month of December, 1858, Mrs. Marston, at her desire, had an interview with Mr. Taylor, the solicitor, and gave him instructions for the deed. After Mrs. Marston's death, Mary Elsworth purchased the interest of John Anderson the younger, in the moiety which fell in in 1855, for 200*l.*

Statement.

Mr. *Malins* and Mr. *Dickinson*, for the plaintiffs:—

Argument.

There were several grounds on which this deed must fail.

First. It was submitted that the evidence showed that Elizabeth Marston, at the time she executed it, was of unsound mind, and, if so, the deed could not stand.

Secondly. Assuming that she was of sufficient capacity, the evidence showed that the deed was executed under undue influence, and must, therefore, be set aside by this Court. The principle on which the Court relieved against undue influence was general and applicable to every case in which one person exercised great influence over the mind of another. In the case of *Nottidge* v. *Prince* (*a*), recently decided by his Honour, the influence was religious, and rather that of a teacher exercised over his whole congregation than over a single

(*a*) *Antè*, vol. 2, 246.

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individual, but the Court relieved against it. In that case, his Honour said (*b*), "The principle prevails where there exists a relation which naturally creates influence over the mind. Therefore the doctrine extends to the relation of attorney and client, of guardian and ward, of parent and child."

In *Huguenin* v. *Basely* (*c*), a voluntary gift to a religious teacher and his family was set aside on the ground of undue influence, and Lord Eldon expressly said (*d*), "The question was not whether she knew what she was doing, had done, or purposed to do, but how the intention was produced." In *Gibson* v. *Jeyes* (*e*), which was a case of attorney and client, the Court set aside the sale of an annuity. *Hatch* v. *Hatch* (*f*) was a case of guardian and ward; the Court set aside a conveyance twenty years after the transaction, the guardian being dead. Lord Eldon, in that case, said (*g*), "There may not be a more moral action, or one that would do more credit to a young man beginning the world or afford a better omen for the future, than to do an act of bounty to a trustee who has done his duty, but the Court cannot permit it." *Wright* v. *Proud* (*h*) was the case of a keeper of a lunatic asylum; *Dent* v. *Bennett* (*i*) was the case of a medical man; *Hunter* v. *Atkins* (*k*) was that of a confidential agent: and in all these cases the gift was set aside on the ground of undue influence.

Cooke v. *Lamotte* (*l*) was very like this case. A nephew obtained a *post obit* bond from his aunt, who had provided for him by will; but the Court set it aside, on the ground that it could not be shown that the donor

(*b*) *Antè*, vol. 2, 269, 270.
(*c*) 14 Ves. 273.
(*d*) Ibid. 300.
(*e*) 6 Ves. 266.
(*f*) 9 Ves. 292.
(*g*) Ibid. 296.
(*h*) 13 Ves. 136.
(*i*) 7 Sim. 539; s. c. 4 M. & Cr. 269.
(*k*) 3 M. & K. 113.
(*l*) 15 Beav. 234.

knew that the effect of giving the bond was to make the will irrevocable.

In *Billage* v. *Southee* (*m*), the Court relieved against a promissory note, which a patient, on his rise in life, gave to his medical adviser, for a sum beyond what could have been due.

In *Osmond* v. *Fitzroy* (*n*), a bond, obtained secretly from his young master by a servant, was set aside on the ground of undue influence.

[*Clarkson* v. *Hanway* (*o*), *Howard* v. *Fingall* (*p*), *Gresley* v. *Mousley* (*q*), *Blackie* v. *Clark* (*r*), *Hoghton* v. *Hoghton* (*s*), were also cited on the ground of undue influence.]

Thirdly. It was submitted, that the deed, containing no power of revocation, was invalid, as it was not shown that the effect of such an omission was explained to the settlor. In *Nanney* v. *Williams* (*t*), the Master of the Rolls set aside a deed on that express ground; and, in the case of *Forshaw* v. *Welsby*, heard on the 20th of December, 1860, the Master of the Rolls again took the same view. In *Harvey* v. *Mount* (*u*), the Court set aside a deed, without power of revocation, mainly on that ground (*v*), and gave the solicitor, who proposed and who was a party, no costs, for neglecting to point out to the settlor the effect of such a deed. It was clear, the heir-at-law was entitled to impeach the objectionable instrument: *Bennet* v. *Vade* (*w*), *Gibson* v. *Russell* (*x*).

On the whole case, it was submitted that the deed must be set aside and the estate re-conveyed.

Mr. *Bacon* and Mr. *Francis Bacon*, for the defendants:—

(*m*) 9 Hare, 534.
(*n*) 3 P. Wms. 129.
(*o*) 2 P. Wms. 203.
(*p*) Not reported, 1852.
(*q*) *Antè*, vol. 1, 450.
(*r*) 15 Beav. 595.
(*s*) Ibid. 278.
(*t*) 22 Beav. 452.
(*u*) 8 Beav. 439.
(*v*) Ibid. 451.
(*w*) 2 Atk. 324.
(*x*) 2 Y. & C. 104.

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Argument.

The plaintiffs had failed in establishing a case of mental incapacity; but, on the other hand, the evidence adduced by the defendants clearly showed Mrs. Marston was of sound mind. The attempt to establish undue influence had equally failed. The real point at issue was the state of Mrs. Marston's mind in December, 1858, and January, 1859, about the date of the execution of the deed. To this point the defendants' evidence was chiefly addressed, and it proved conclusively that she was then sane and so continued up to her death. This Court had never sanctioned or adopted the proposition, that where a voluntary deed is of such a nature that it might have been avoided by the grantor, it might, as a necessary consequence, be avoided by the heir-at-law of the grantor or devisee. Where, indeed, a deed bore evidence on its face or in its execution that it might be set aside, it was void *ab initio*. But in cases where there was no proof of fraud and no evidence of undue influence, there is no instance of the Court having ever set aside a voluntary deed at the suit of volunteers. The heir-at-law of the author of a voluntary conveyance could not avoid the deed, under the statute 27 Eliz. c. 4, by a conveyance for value: *Parker* v. *Carter* (*a*). The same principle has been laid down in the case of *Doe* dem. *Newman* v. *Rusham* (*b*); and the view of Vice-Chancellor Wigram (*c*) was approved of by Lord Campbell. In *Pratt* v. *Barker* (*d*), the Court refused to set aside a voluntary deed at the instance of the settlor, an infirm old man of eighty, in favour of his medical adviser, it appearing that the effect of the deed was fully explained, and that no undue influence had been used. In *Smith* v. *Garland* (*e*), it was held that, as a general rule, a court of equity will not assist a vendor in defeating a

(*a*) 4 Hare, 409.
(*b*) 17 Q. B. 723.
(*c*) Ibid. 730.
(*d*) 1 Sim. 1.
(*e*) 2 Mer. 123.

prior voluntary settlement made by himself. In *Villers* v. *Beaumont* (*f*), it was held that a voluntary settlement, without power of revocation, should bind the settlor and not be defeated by a will made subsequently.

Argument.

On the above case it was submitted, that this bill must be dismissed with costs.

THE VICE-CHANCELLOR:—

Judgment.

This deed must be set aside. The evidence in the cause is conflicting as to the health of Elizabeth Marston. Some of the witnesses depose, that she was a woman of about seventy years of age, of sound mind and healthy body. On the other hand, there is evidence which it is impossible to disbelieve, proving that before the year 1858 Elizabeth Marston was greatly enfeebled in body and not strong in mind. Mr. Taylor, who seems to be an honest and truthful witness, is the solicitor who prepared the deed. He saw Elizabeth Marston first in the year 1857, more than a year and a half before the deed was prepared. When she sent for him in the end of December, 1858, upon the subject of this deed, he says he was surprised at the improved state of her health, and altogether at her improved appearance. On former occasions, when he had transacted business with her, his evidence does not show that she was incapable to transact business, but it shows, that she was above seventy years of age, and dirty and slovenly in person, and, though capable of transacting business of importance which she understood, she does not appear to have had any high degree of capacity. It appears from Mr. Taylor's evidence, that in the year 1857 she showed a good deal of shrewdness and acuteness, for, on one occasion, in a matter not connected with the present question, he had thought she ought to execute a will, and, without directions from her, he prepared a will, of which he proposed to read

(*f*) 1 Vern. 100.

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Judgment.

over to her the draft. This she declined to allow him to do, and expressed displeasure at his preparing a will without instructions, and accordingly refused to execute it. This was in 1857; but in 1858, when her appearance was so much improved, she sent for him, and told him it was for the purpose of finally settling her affairs and disposing of all her property. His language is very carefully framed, and I believe is the exact truth. He says, "She told me she sent for me, as she was desirous of making some final disposition of all her property, which consisted of certain freehold lands situate at Kearby-with-Netherby, in favour of the defendant Mary Elsworth, and she gave me as a reason for such disposition the kindness of Mary Elsworth," and she proceeded to discuss with Mr. Taylor the difference between a deed and a will; and it appears distinctly, from his evidence, that she preferred a deed for the final settlement and disposition of her property, to a will, by which she had also thought of finally disposing of it and settling it. She preferred a deed because it would be cheaper; but he says he explained to her that the deed would be irrevocable; and that is the only distinction between a deed and a will which, it appears from the evidence, he conveyed to her mind; and it appears from this evidence, that what she consulted him about was the final disposition of her property, not by a present gift, but by leaving it; because, she said, there was a certain class of persons to whom she was determined not to leave it. She preferred a deed because she was told it was cheaper; and Mr. Taylor prepared a deed of the simplest kind, by which, at once and from the date of the deed, she grants and disposes of all this freehold property, which she knew was all the property which she had in the world, in favour of Mary Elsworth. She had a complete right to deal with her property as she pleased. But the deed being voluntary, it must, in order to be valid, be shown to have

been executed upon proper explanation and understanding that she was immediately conveying away all her property, and not "leaving" it to Mary Elsworth. Nothing could be more improvident than for a woman at her time of life to dispose of the whole of her property so as to leave to herself nothing. No doubt, the gift was to a person with whom she was living and who was kind to her. But the question now is, whether she understood that she was, from the moment she executed the deed, absolutely parting with the whole of her property. It was the duty of Mr. Taylor to tell her of another important difference between a deed and a will, viz. that a deed was only irrevocable if it contained no power of revocation, but that if she disposed of all her property by will, it would leave her in possession of it during her lifetime. There is no evidence to show that Mr. Taylor ever told this aged woman, that such a deed as he had prepared was irrevocable, and that she ought to reserve to herself for life the use of the property, which she would have retained in case she had executed a will. It does not appear, from any expression, or act, or anything that can be shown in the way of evidence, that she had the smallest notion, when she gave the property to Mary Elsworth, that she was giving it to her immediately and depriving herself during the whole of her lifetime of the rents and profits of the property, and that nothing was left to her upon which she could subsist, except from the bounty of Mary Elsworth or some other person.

Where an instrument is executed by a person in the situation of this poor woman—assuming that she was of sufficient capacity to dispose of her property—to make her voluntary and improvident deed of gift valid, it must be proved by those who claim under it that the donor perfectly understood the whole nature and effect of the deed. It does not appear that the effect of the deed as

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depriving herself immediately of all her property was explained to and understood by her; it is clear, that except on the subject of expense, and that it would not be revocable, she understood no difference at all, so far as regarded her own interest and her own life estate, between the deed she was executing and a will. Now, if that be so, according to the rule of this Court the deed cannot stand. There is this difficulty in the case of the plaintiffs, that Elizabeth Marston certainly had a distinct intention to give her property to Mary Elsworth, who takes it by this deed, to the exclusion of all other persons. That she clearly, fully, and distinctly understood and meant. Therefore, if the effect of the deed is to give the property absolutely to the very person to whom Elizabeth Marston clearly and distinctly intended to give it, on what principle is the deed to be set aside? She might have complained of it in her lifetime, but she is dead, and there is no one now entitled to ask to have the deed set aside, except those who are as much volunteers as Mary Elsworth, the present holder of the property. The plaintiffs, it may be said, who are mere volunteers, ask for the assistance of the Court to dispossess another volunteer. But the answer to this argument is plain: the case is not one of mere volunteers, but of a deed of gift executed by a person who did not fully understand the nature and effect of the gift which was made as it affected her own interests, though she fully understood it with reference to the benefit to be conferred on Mary Elsworth. This Court never can recognise any mere voluntary deed of gift, when it appears that the nature of the gift was not fully understood by the donor. There is a wide difference between a deed of this kind and a deed of voluntary gift well understood; and the law of this Court is that, in the case of a well understood but voluntary deed of gift, this Court will not interfere to set it aside at the

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suit of either heir or devisee, who claim merely as volunteers. But if there be an infirmity in the deed—if it was imperfectly understood by the author—then, at the instance of the heir-at-law or the devisee, though they are mere volunteers, this Court, treating the deed as an imperfect gift and an invalid gift, holds that the property has not passed from the author of the gift, but has descended to the heir or devisee, according to the circumstances of the case. That is a well-settled, clear, and broad distinction; and, having shown the plaintiffs that the deed was executed by a person who had been in a very infirm state of body and mind, but from which there was a recovery, and that she executed it without a sufficient explanation and understanding of its immediate effect upon herself, the duty of the Court is then to set this deed aside. The suit being a hostile suit, I think the plaintiffs are entitled to a decree, but without costs; but those defendants who declined to join in the suit must bear their own costs. The decree must be to set aside the deed, but without costs. The order, therefore, will be to set aside the deed, and to direct the defendant Mary Elsworth to convey to the heir-at-law or to such persons as he shall direct.

LLOYD *v.* CHEETHAM.

June 29th.

THE plaintiff moved for an injunction to restrain the defendant, Charles Cheetham, a retired officer in the army, from receiving or applying to receive the yearly pension of 220*l.* in the bill mentioned, or any one or more

An assignment by a retired military officer of his pension for valuable consideration is void under the 47 Geo. 3, c. 25, and the Court refused an injunction to restrain the officer from applying for or receiving the pension.

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Statement.

future payments therefor, and from authorising, empowering, or enabling any person or persons other than the plaintiffs to receive the same respectively, and from obstructing the payment thereof to the plaintiffs, so long as any money remained due and owing to the plaintiffs on the security of the indentures of the 27th of April, 1858, and 13th of May, 1858, in the bill mentioned.

The defendant had formerly been a Captain in the Royal Artillery, but some time previously had retired from the service on a pension of 220*l.* per annum.

In April, 1857, the defendant borrowed from the Indisputable Life Insurance Company the sum of 900*l.*, and effected with the company an insurance on his life by way of securing the same at an annual premium of 62*l.* 9*s.* 5*d.*

By an indenture, dated the 27th of April, 1858, between the defendant and the plaintiffs, reciting the above insurance; and that in consideration of a yearly premium of 62*l.* 9*s.* 5*d.*, the sum of 1800*l.* was made payable to the executors, administrators, and assigns of the defendant, within three months after proof of his death; and that on the 1st of May, 1857, the Indisputable Company advanced to the defendant the sum of 900*l.* on the security as well of the aforesaid pension as of the said policy; and that the sum of 846*l.* 5*s.* 2*d.*, part of the said sum and interest, still remained due and owing from the defendant; reciting also, that the Indisputable Company had amalgamated with the Eagle Insurance Company; and that upon such amalgamation, the plaintiffs became jointly entitled to the said sum of 846*l.* 5*s.* 2*d.* and interest; also that the plaintiffs, at the request of the defendant, had agreed to advance to him a further sum of 653*l.* 14*s.* 10*d.*; it was thereby witnessed that, in consideration of the said debt and the said advance, making together 1500*l.*, and interest, the defendant assigned and transferred to the plaintiffs, their executors, administrators, and assigns, "all that the said yearly pension or

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sum of 220*l.*, so granted and payable to the defendant for life as aforesaid, together with the said policy, to secure repayment of the said sum of 1500*l.*, and interest; nevertheless, subject to a proviso for redemption and re-assignment in case of payment of the said debt and interest; and the defendant thereby covenanted to pay the debt and interest. Also that it might be lawful for the plaintiffs to have, hold, receive, take and enjoy the said premium, policy monies and premises without let, suit, interruption, or denial of, from, or by the defendant; further, that he, the defendant, would not, at any time, without the consent in writing of the plaintiffs, or the order, judgment, or decree of some court of law or equity, receive, release, acquit, or discharge all or any part of the said pension, or yearly sum, policy monies and premises thereby assigned, or intended so to be. There was also a covenant for title in the usual form.

On the same day, the defendant executed a deed-poll under his hand and seal, whereby he nominated and appointed the plaintiffs and Charles Jellicoe, his attorneys, to ask, demand, and receive of and from the Paymaster of the Forces for the time being, or of and from whomsoever else the payment thereof did or might concern, all such sum or sums of money as then were or might thereafter become due and payable to the defendant, for any appointment or service, pension or allowance, of whatever description, including any allowance he might be entitled to receive from her Majesty's Treasury, Exchequer, Ordnance, or other public department.

On the 13th of May, 1858, the defendant executed a deed of further charge, whereby the pension was charged with a further sum of 100*l.*, payable to the plaintiffs, making, in the whole, the sum of 1600*l.*

In April, 1861, the defendant applied for and received payment of the pension and the arrears due.

On the 22nd of June, 1861, the plaintiffs filed this bill.

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Argument.

Mr. *T. Stevens* now moved for an injunction to restrain the defendant from receiving the pension in violation of his agreement, and cited the case of *Knight* v. *Bulkley*, in which the Court granted an injunction to restrain the defendant, who was a retired officer in the army, from receiving a pension for wounds, which he had assigned for valuable consideration, and also from executing any power of attorney, enabling any person other than the assignee to receive it. It was submitted that this case was, in effect, identical.

Mr. *Baggallay*, on behalf of the defendant, contended that the assignment was void, under the 4th section of the 47 Geo. 3, sess. 2, c. 25. The defendant would not have resorted to such a defence, except from his extreme necessities. In *Knight* v. *Bulkley* (*a*), the attention of the Court was not called to the Act (*b*).

Judgment.

THE VICE-CHANCELLOR:—

It is impossible in the face of the Act of the 47 Geo. 3, c. 25, to grant any relief founded on an assignment, which is made void by the 4th section. The plaintiffs have made an unfortunate bargain, from which it is impossible for the Court to relieve them. I can make no order on the motion.

(*a*) June, 2, 1858, not reported.

(*b*) The 47 Geo. 3, c. 25, s. 4, is as follows: — "That all assignments, bargains, sales, orders, contracts, agreements, or securities whatsoever, which shall be given or made by any person entitled to any such pay, pension, allowance, or relief as aforesaid, for, upon, or in respect of any such his pay, pension, allowance, or relief, shall be absolutely null and void to all intents and purposes."

COOK *v.* THE EARL OF ROSSLYN.(*a*) *Re* HOOK (Solicitor).

1861.
June 3rd.

A bill of interpleader, where the whole ground for relief rested on a false allegation of a threat and intention by one of the defendants to bring an action, was dismissed; and the plaintiff's solicitor, who filed the bill, being proved to be aware that the allegation was groundless, it was ordered, on the petition of one of the defendants, for whom he also acted as solicitor, that all items in his bill of costs in respect of the interpleader suit be disallowed.

BY an indenture of settlement, dated the 10th of November, 1829, executed on the marriage of Bethell Walrond, Esq., with Lady Janet St. Clair Erskine, certain property was conveyed and assigned to the defendant, Lord Loughborough, afterwards Earl of Rosslyn, upon the trusts in the said indenture mentioned. Among the property comprised in the settlement was included the house No. 8, Clifford Street, Bond Street.

Lord Rosslyn demised the house for a term with leasing powers to Mr. Walrond, to secure the sum of 3200*l.* and interest. On the 26th of September, 1848, Mr. Walrond demised the house for a term of years, which had subsequently become vested in the plaintiff. In October, 1859, the term for the original demise, which was vested in the mortgagee Walrond, was assigned with a view to surrender it, and it was surrendered by Mr. Walrond, and thereby became merged in the inheritance. Lord Rosslyn, therefore, thereby became entitled to demand the rent.

On the 8th of November, 1859, Messrs. White, Broughton & White, the Earl of Rosslyn's solicitors, wrote to the plaintiff as follows:—

"We have received instructions from Lord Rosslyn to give you notice that, under and by virtue of an indenture of settlement, dated the 10th of November, 1829, and made between Bethell Walrond, Esq., of the first part, and Lady Janet Walrond (then Lady Janet St. Clair Erskine) of the second part, the said Earl of Rosslyn (then Lord Loughborough) and Francis William Russell, Esq., of the third part, he is the person entitled to receive the rents of the house and premises No. 8, Clifford Street; and the said Earl of Rosslyn requires you not to

(*a*) See *ante*, vol. i. 167.

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pay the said rent except upon his receipt. Any payment made except upon the receipt of the said Earl of Rosslyn will be made at your peril, as his lordship hereby distinctly informs you that any such payment will be disallowed by him."

On the receipt of this letter, Mr. Hook wrote demanding in what character Lord Rosslyn demanded the rent, and received the following reply:—

"Lord Rosslyn claims the rent of the house in Clifford Street, occupied by Mr. Cook, as being the person entitled to the immediate reversion expectant on Mr. Cook's tenancy, if Mr. Cook's tenancy has been legally created."

In answer to other letters, the following answer was returned:—

"Lord Rosslyn has no alternative but to act as he does; and no Court, with the circumstances before them, could possibly censure him for doing his duty. Lord Rosslyn, being legal owner of the house, does not consider it necessary to file a bill or obtain a receiver; and we have now to apply to you, as representing Mr. Cook, for the payment of the rent due to Lord Rosslyn. Unless it is paid within seven days, we shall deem it our duty to have recourse to legal proceedings."

Mr. Hook, shortly after the date of this letter, as Mr. Walrond's solicitor, filed a bill against the Earl of Rosslyn and Mr. Walrond, alleging that Lord Rosslyn threatened to take proceedings to recover the rent; and also, in paragraph 12, that Mr. Walrond threatened and intended to commence and prosecute an action against the plaintiff Cook for the recovery of a quarter's rent, due at Christmas last, and praying that the two defendants might be ordered to interplead together.

The amount of the rent was thereupon paid into court.

Notice of motion for an injunction was given against both defendants, but the cause was ultimately ordered to stand over. In February, 1861, an order was made, on

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Statement.

the application of Mr. Walrond, to tax Mr. Cook's costs against him in the case of *Cook* v. *The Earl of Rosslyn*, Subsequently Mr. Walrond presented a petition in the cause, praying that, in taxing the said costs, all items charged in respect of costs, charges, disbursements, and other matters in the said cause, might be disallowed.

In support of the petition, it was alleged that the statement made in the 12th paragraph of the bill was untrue to the knowledge of Mr. Hook. The petition stated that, from March, 1859, to May, 1860, the petitioner employed Mr. Hook as his solicitor, and that he ceased to be his solicitor on payment of 300*l.* into court for costs. When Mr. Hook ceased to be his solicitor, he said nothing about his being the solicitor of Mr. Cook. That when Mr. Cook received the notice, in November, 1859, from Lord Rosslyn's solicitors, Mr. Hook wrote to the petitioner, stating the receipt of the notice, and that Lord Rosslyn was determined to persecute him (there having been differences in the petitioner's family, in which Lord Rosslyn had taken part), and that Mr. Cook had already been put to an expense of 77*l.*, for which amount he intended to bring an action against Lord Rosslyn. That the petitioner being too unwell to write, Mr. Henry Walrond, his son, replied to the letter. That Mr. Hook again wrote, stating that Cook had been advised by counsel to file a bill against Lord Rosslyn, in order to protect himself from liability; and on the 16th of January again wrote as follows to Mr. Walrond, jun.:—"Cook has filed his bill of interpleader. Lord Rosslyn contends that, as he has paid off the mortgage, all interest that the mortgagee had is now vested in him. I imagine he now sets up this claim for the purpose of annoying your father, and to compel him to come into White's terms. It is remarkable, that White says that he will give this notice on the part of Lord Rosslyn. Shall I appear for your father to the bill, and make his defence?" That Mr.

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COOK v. THE EARL OF BOSSLYN. *Re* HOOK.

Statement.

Henry Walrond wrote in reply to say that he was to appear, if necessary, and added, "Would it not be better to tell Cook not to proceed yet, as my father will not proceed against him for the rents, and he does not understand that White has yet demanded them." That Mr. Hook did not communicate to the plaintiff Cook what was stated by Mr. Henry Walrond as to no proceedings being taken against him for the rent, and shortly afterwards that Mr. Walrond came to London and called upon Mr. Hook, who told him that Cook's (the plaintiff's) case must fail. At this time, Mr. Hook was acting as the plaintiff's solicitor, and the bill had been filed. The petitioner alleged that no copy of the bill had been sent; otherwise from the bill the petitioner must have known that Mr. Hook was acting for Mr. Cook. The petitioner had no copy of the bill. The petitioner alleged that Mr. Hook had acted for both parties, and gave notice of motion for an injunction against Mr. Walrond on behalf of Mr. Cook; while for Mr. Walrond he instructed counsel to oppose the motion.

A change of solicitors then took place, and Mr. Turner from that time became Mr. Walrond's solicitor. On Saturday, the 9th of February, Mr. Walrond was walking in Bond Street, when a person who was then a stranger to him, but who turned out to be Mr. Cook, crossed the street, and spoke to him on the subject of the litigation. It was then discovered, for the first time, to what extent Mr. Hook had been acting for both parties.

The petition and the cause now came on to be heard.

Argument.

Mr. *Malins* and Mr. *Downing Bruce*, in support of the petition, contended that Mr. Hook was wholly without authority in instituting the suit of interpleader, as he must have known there was no possible defence to Lord Rosslyn's claim. The statement in the 12th paragraph of the bill, which was the only allegation to support the bill, Mr. Hook must have known to be untrue. Even if he had

inadvertently put the bill on the file, there was no excuse for going on with the suit; and, under such circumstances, it would be most unjust to throw the expenses which had been so recklessly incurred on the petitioner. With regard to Mr. Cook, it was his misfortune to have been badly advised.

Argument.

Mr. *Bacon* and Mr. *Hardy* contended that it was proved that at one time Mr. Walrond did threaten to take legal proceedings. It might well be that this originated in a family quarrel; but it would be most unfair to make Mr. Hook responsible for the consequences of the unreasonable conduct of the parties.

Mr. *Greene* and Mr. *Jones Bateman* appeared for Lord Rosslyn, and objected to bear any part of the costs. They also asked that the fund in court might be paid to Lord Rosslyn, whose title was unimpeachable.

THE VICE-CHANCELLOR:—

Judgment.

The bill alleges, that Mr. Bethell Walrond has threatened to commence and prosecute an action for the recovery of a quarter's rent due on the 25th of December. That allegation is disputed; and, therefore, unless the plaintiff can prove the truth of it, there is no case of interpleader at all. He has not only failed in proving it, but on the very face of the bill it would appear that, if any such threat was made, it was a threat so idle that a serious question would have remained for decision, whether enough was stated to sustain the suit. The bill states distinctly that in October, 1859, there had been an assignment of the term vested in the mortgagee for the purpose of surrendering it; and it was surrendered. According to the plaintiff's case, he was still required by the mortgagee to pay rent to him, Mr. Walrond; and

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Judgment.

his bill states that the whole right theretofore in the mortgagee had been transferred to the Earl of Rosslyn; so that any threat on the part of Mr. Walrond would have been nugatory. But the case does not depend upon that. The plaintiff must explain satisfactorily why the bill was filed, and, when filed, why the injunction was asked for and the subsequent proceedings taken.

Mr. Walrond, in his petition, complains that Mr. Hook, his solicitor, and also the solicitor for the plaintiff in the interpleader suit, and who volunteered and suggested that he should be the solicitor for Mr. Walrond, has entirely miscarried in his duty; and the petition prays that, in taxing Mr. Hook's bill of costs, all items charged against Mr. Walrond in respect of costs, charges, disbursements, and other things, in the suit of *Cook* v. *The Earl of Rosslyn*, be disallowed. It is painful to be obliged to refer to the facts that are too clearly proved. It appears that, on the 12th of January, Mr. Hook, acting as solicitor for the plaintiff Cook, the tenant, filed a bill of interpleader. It was filed under the advice of counsel; and the case, on which the advice of counsel as to the manner in which the bill should be framed was taken, stated that Mr. Walrond threatened or intended to bring an action for a quarter's rent which had then accrued. This statement was wholly without foundation. The only apology offered—and it is no apology at all—by the counsel for Mr. Hook, for making that allegation is, that in October, 1859, Mr. Walrond had said that, unless the rent was regularly paid, he would bring an action for every quarter's rent. Mr. Hook, when he stated the case for the opinion of counsel, knew that the whole right of Mr. Walrond was then gone; and, though he must have been aware of all the contents of the deed of 1859, upon which he instructed his counsel and which the counsel

on those instructions set out in the bill of interpleader, he failed to direct the attention of counsel to the scope and operation of that deed, although counsel suggested that the right of Mr. Walrond had entirely ceased.

It is painful to advert to the letter of Mr. Hook, which he wrote to Mr. Walrond, whom he knew to be on bad terms with Lord Rosslyn; for in that letter, in which he suggested that he should appear as solicitor for Mr. Walrond, he begins by suggesting to the irritated mind of Mr. Walrond, that the claim of Lord Rosslyn was only made with a view to persecution; whereas he must have been aware that it was as clear a claim as could be made at law or in equity. But, there being a family quarrel, Mr. Hook thought it a decent thing to suggest that the claim was merely made for the purpose of persecution, and that he should become the solicitor for Mr. Walrond in opposition to an irresistible claim. Mr. Hook ought to have told Mr. Walrond that Lord Rosslyn's claim was irresistible; and that, whatever difference there was between them, there ought to be no obstruction to Lord Rosslyn recovering the rent. Mr. Hook has made a great mistake, and for that mistake he, and not his client, must pay.

The subsequent proceedings were not less remarkable; for, in opposition to the letter of the 16th of January, he, being the solicitor for the plaintiff, puts upon the file of the court, on the 18th of January, an affidavit, in which the plaintiff Cook was allowed to swear what Mr. Hook knew to be a mistake, viz. that Walrond had threatened an action. The prayer of Mr. Walrond's petition must be granted. The order must be, to dismiss the bill with costs—to be paid by Hook—and to pay the money in court to Lord Rosslyn; and as to the petition, there must be an order that, in taxing the bill of costs of Hook against Mr. Walrond under the order of the 4th of February,

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COOK v. THE EARL OF ROSSLYN. *Re* HOOK.

Judgment.

all items in respect to costs and disbursements and other charges in the suit of *Cook* v. *The Earl of Rosslyn* be disallowed, and that Hook pay the costs of the petition.

July 23rd.

HOPKINS *v.* PHILLIPS.

Bequest of 200*l.* to aid of deaf and dumb, *to found* a chapel for them in London—*Held* void under the Statute of Mortmain.

GEORGE EDWARD TOWRY, a deaf and dumb testator, by a codicil to his will, bearing date the 22nd of October, 1850, among other legacies gave the following, "200*l.* to aid of deaf and dumb, to found a chapel for them in London, as a bequest."

The testator died on the 26th of October, 1857, and his will was proved shortly afterwards. There were two claimants for the legacy, the Association in Aid of the Deaf and Dumb, and the London Society for the Propagation of the Gospel among the Deaf and Dumb. An administration summons was taken out; and, on the 2nd of July, 1861, the chief clerk made his certificate, which, as regarded the legacy of 200*l.*, was as follows:—

"Claims to the said legacy have been made on behalf of two societies only, viz. the Association in Aid of the Deaf and Dumb, and the London Society for the Propagation of the Gospel among the Deaf and Dumb. If the Court shall be of opinion that the said legacy is a valid legacy, the same, with interest at 4 per cent. (less income-tax) from the 24th of October, 1858, is payable to the treasurer for the time being of the Association in Aid of the Deaf and Dumb. The claim of the London Society for the Propagation of the Gospel among the Deaf and Dumb has been disallowed."

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HOPKINS v. PHILLIPS.

Statement.

The summons was adjourned into court, and two questions were raised: first, whether the gift was void under the Statute of Mortmain; and secondly, if valid, which society was entitled; or whether both were entitled to participate in the bequest. The evidence was briefly as follows:—

The Rev. Samuel Smith deposed: "I am the chaplain of the Association in Aid of the Deaf and Dumb, and secretary to the building fund of the association. The association was formed in London in or about the year 1841, and was remodelled to its present constitution in the year 1855, when its objects were stated in the then rules of the association to be, *inter alia*, firstly, the employment of qualified agents to impart religious and moral instruction to the deaf and dumb at their houses; and, secondly, the establishment of religious services for the deaf and dumb throughout the metropolis; and the objects of this association are still in substance the same. From the month of August, 1855, to the time at which I was ordained, which was in the month of June, 1860, I was the principal instructor and agent of the association; and the only religious services then established for the benefit of the deaf and dumb in the metropolis, under the auspices of the association, were some lay services, which were held every Sunday at Fitzroy Hall, Little Portman Street, Oxford Market, which were conducted by me, and which consisted in the reading, in the finger-and-sign language of the deaf and dumb, of certain portions, of the Church of England liturgy and Scripture; the same being followed by an address or sermon. In April, 1857, I entered King's College with a view to my ordination as a minister of the Established Church, and for the special purpose of ministering amongst the deaf and dumb in connection with the said association. As the time for my ordination approached, positive steps for raising a

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fund for erecting building in London to comprise, *inter alia*, a place of worship for the deaf and dumb, were taken; and, in the month of June, 1860, a building committee, composed of members of the said association and others, was formed for the purpose of carrying out certain arrangements for the building, *inter alia*, in London a chapel for the deaf and dumb, and which it is the intention of the said association to erect as soon as funds shall have been obtained sufficient for the purpose."

Mr. Daniel Thomson Baker, on the same side, also deposed: "I am one of the committee of the Association in Aid of the Deaf and Dumb. I, who am deaf and dumb, became acquainted with the testator, who was similarly afflicted, about the month of July, 1857. The testator was lodging in the house of a friend of mine, who has a son deaf and dumb, now my pupil; and the testator wrote me a note requesting me to call upon him, which I did; and, at the interview which I had with the testator, we entered into conversation upon the subject of the constitution and objects of the association, which had theretofore been in operation for imparting religious instruction to the deaf and dumb, and which had been superseded by the new one, viz. the employment of agents to visit the deaf and dumb, and the Sunday services, which were then being conducted for them at the Fitzroy Hall; and I explained to the testator that Mr. Bather, another member of the committee, and I were interesting ourselves to procure agents conversant with the finger-and-sign language of the deaf and dumb, and capable of conducting religious services in such language for their edification; and I also discussed generally with the testator the great need which the deaf and dumb of the metropolis had of a regular place of worship and, mentioning to him that Fitzroy Hall was not the sort of place for religious services which we

desired and that; as Mr. Smith had then gone to college to prepare himself for the ministry, we hoped, after he should have been ordained, to be able to obtain funds sufficient to build a fitting place of worship."

Statement.

On behalf of the London Society, Mr. Burns, the honorary secretary of that society, who was himself deaf and dumb, deposed as follows:—

The main object of the society, has, since its origin in the year 1840, been to give religious instruction to the deaf and dumb in London on Sundays, and for that purpose the society has, from time to time, since the year 1840, held religious services each Sunday in a room rented for the purpose, first, in Bartlett's Buildings, Holborn; afterwards in the chapel of the Scottish Hospital, Fleur-de Lys Court, Fetter Lane; then at the Educational Institute, 58, Aldersgate Street; and since the year 1856, in the Shaftesbury Hall, No. 36, Aldersgate Street, and the place of meeting from time to time for such religious services has been commonly known and described among the deaf and dumb, and in the statements and reports from time to time printed and circulated by the said society among its supporters and the public, as "the Deaf and Dumb Chapel in London." On one occasion, about ten years before his death, the testator personally attended the religious service conducted by the society, at the time when it was held at the Scottish Hospital, near Fetter Lane.

Argument.

Mr. *Craig* and Mr. *Schomberg*, for the plaintiffs in the administration summons, submitted the question to the Court, and called the attention of the Court to the case of *Giblett* v. *Hobson* (*a*), in which it was held by Lord Brougham, that a bequest towards building an almshouse to a charitable institution was void under the Statute of Mortmain; but it was also held, that matter *dehors* the

(*a*) 5 Sim. 651; s. c. on appeal, 3 M. & K. 517.

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will might be looked at, in order to place the Court in the situation of the testator, with a view to determine whether the testator contemplated building upon land already in mortmain or to be acquired by other means than the application of the legacy. In that case, therefore, the extrinsic evidence was admitted, though the gift was held void.

Mr. *Grenside*, for the London Society for the Propagation of the Gospel among the Deaf and Dumb.

It was no criterion of the invalidity of a charity bequest that it was incapable of being administered in this court: *Nightingale* v. *Goulbourn* (*a*).

This bequest, if carried into effect, did not necessarily imply the purchase of land or the construction of any building, inasmuch as the society already had a chapel of their own.

In *Hartshorne* v. *Nicholson* (*b*), it was held that a gift to establish a school was valid. It was reasonably clear that, when the testator gave 200*l.* to found a chapel, he could not have meant that the trustees were to buy land and build a chapel in London for such a sum, because that would be impossible to accomplish. He evidently used the word "found" in the same sense as "establish," which was a good gift. It appeared from the evidence which was admissible that the testator had himself attended the chapel of the London Society several years ago. The testator, therefore, knew that there was a chapel for the deaf and dumb in London; and the obvious meaning of the gift was that the legacy should be applied in aid of that chapel. It was submitted, therefore, that the gift was valid.

Then, if the gift was valid, arose the question which

(*a*) 5 Hare, 484; s. c. 2 Phill. 594. (*b*) 26 Beav. 58.

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society was entitled. It was clearly to be in aid of some chapel in London; and, therefore, the London Society for the Propagation of the Gospel among the Deaf and Dumb fell more closely within the description than the other society; but, even if the Court should think it doubtful which of the societies was intended, it might distribute the fund between the two.

[*Carter* v. *Green* (*a*) was also cited.]

Mr. *Dart*, on behalf of the Association in Aid of the Deaf and Dumb, relied on the evidence above given, and submitted, first, that it was a good gift; and, secondly, that the society he represented was entitled. He cited, *Johnston* v. *Swann* (*b*), *Edwards* v. *Hall* (*c*), *The University of London* v. *Yarrow* (*d*).

Mr. *Malins*, Mr. *Bevir*, Mr. *Hobhouse*, and Mr. *Kekewich*, appeared for different parties, but were not called on.

THE VICE-CHANCELLOR:—

Judgment.

It is the duty of the Court, in cases of this kind, to uphold the devise, if it is possible to find an object of the gift within the reach of the law. Here the objection is, that the Statute of Mortmain interferes, and that, upon the true construction of the codicil, what was contemplated by the testator was the building of a chapel. And certainly, *à priori*, where the gift is of a sum of money to found a chapel in London, the natural interpretation of that language would be the building of a chapel in London. Part of the evidence in support of the bequest seems fatal to it. The chief clerk, after mentioning the question on the Statute of Mortmain, has stated his opinion to be that, not the London Society for the Pro-

(*a*) 3 K. & J. 591.
(*b*) 3 Madd. 457.
(*c*) 6 De G. M. & G. 74.
(*d*) 1 De G. & J. 72.

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pagation of the Gospel among the Deaf and Dumb was meant by the testator, but that, of the two societies, the Association in Aid of the Deaf and Dumb was more within the intention of the testator, and was in his mind when he made his codicil. The evidence is extremely strong. This codicil was made in October, 1857. The evidence is clear that, in the month of July 1857, shortly before making this codicil, the testator had a remarkable conversation with Mr. Baker, in which the latter referred to what was intended with regard to the Rev. Mr. Smith. Considering that the testator, himself being deaf and dumb, made this codicil in the month of October, 1857, after a conversation having immediate reference to providing a chapel and building a chapel, it is impossible not to come to the conclusion that, when he spoke of a gift "to aid of deaf and dumb, to found a chapel for them in London as a bequest," he had in his mind the same subject as that mentioned in his conversation (only three months before) with Mr. Baker.

The other society, the description of which is more immediately connected with religious purposes, the London Society for the Propagation of the Gospel among the Deaf and Dumb, make out *primâ facie* a strong case. They prove by their evidence that, a great many years ago, on one occasion the testator attended divine service at a place where it was then celebrated, which is not the same place as the hall now used by the society for the purpose of worship, and known and described amongst the deaf and dumb as their chapel. But I cannot come to the conclusion, looking at the evidence on both sides, that the testator had the Shaftesbury Hall in Aldersgate Street, or the fund devoted to the support of that chapel, in his view. Rather the contrary, because the precarious use of a hall hired or obtained for the purpose of using it as a place of divine worship is a very different thing from

founding a chapel; and the circumstance of the testator himself having been in that temporary place of worship might have shown him the necessity of having some chapel founded which might be the permanent chapel of the deaf and dumb. That some such purpose was in his contemplation the evidence of Mr. Baker makes perfectly clear. The natural conclusion from this evidence is that the testator had in his mind a plan for founding a chapel for them in London. This contemplates a building, and brings the bequest clearly within the Mortmain Act. The evidence of Mr. Smith places this beyond reasonable doubt. The language indicates a purpose which was brought to his, the testator's, view only three months before his death. I therefore find it impossible to put any other than the natural construction upon the words "to found a chapel in London." I have come to this conclusion with great reluctance and regret; but I am bound by the law, and I feel compelled to hold that this bequest has failed, as being within the Statute of Mortmain.

The order will be that both societies should have their costs, as between party and party, out of the estate.

1861.
July 4th.

BROWN *v.* BANKS.

Bill by an apprentice praying that the defendant (his master) might be ordered to execute the indenture of apprenticeship, and to take him into his employ and teach him his trade—Dismissed without costs, it appearing that the plaintiff's conduct was objectionable, on account of his idleness and other unsatisfactory particulars.

THE bill stated that the plaintiff, being desirous of learning the trade ofa shipbuilder, applied to the defendant in February, 1859, to take him as an apprentice, which the defendant agreed to do, when it was arranged that the plaintiff should go to the defendant's yard for a month on trial, and that if, at the end of such time, all parties should agree thereto, the plaintiff should be bound apprentice for the term of seven years, at the weekly wages of seven shillings.

The bill alleged that the plaintiff, in the early part of February, 1859, went to the defendant's yard, and commenced working there according to the agreement, and that, having been there for a month, on the 10th of March, 1859, he applied to be bound apprentice, and thereupon the defendant gave him a note to his solicitor, directing him to prepare the articles.

The plaintiff accordingly went to the defendant's solicitor, and executed the articles, when he was told that the defendant would also execute them when there were two or three indentures ready. The plaintiff, relying on this assurance, continued working in the defendant's yard until the 6th of August, 1860. On the 6th of August the plaintiff was refused admission to the yard, whereupon he obtained a summons againt the defendant before the magistrates of the borough of Plymouth, calling on him to show cause why he did not teach the plaintiff his trade. On the summons coming on to be heard, it was ascertained that the defendant had never executed the indenture, in consequence of which defect the magistrate had no jurisdiction to deal with the case.

The bill alleged that, according to the rules of the

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ship-building trade only those persons who had regularly served an apprenticeship of seven years were entitled to obtain constant or good employment in the trade; and, in consequence of the refusal of the defendant to execute the said indenture and receive back the plaintiff into his employ, the plaintiff was prevented from completing the term of seven years' service under the said indenture.

Statement.

The defendant, by his answer, alleged that during the trial month the plaintiff worked well, but that immediately after he began to be idle and lose time and induced the other apprentices to idle. The answer also set forth particular evidences of improper conduct, and submitted that the Court had no jurisdiction to interfere in the matter of the proposed apprenticeship or to compel the defendant to execute the indenture.

There was conflicting evidence as to the improper conduct of the defendant.

Argument.

Mr. *Malins* and Mr. *Roxburgh*, for the plaintiff, contended that the plaintiff was entitled to ask of this Court to direct the execution of the indenture. The Court was not called on to entertain the question whether the apprentice had misconducted himself or not—that was a question for the magistrates under the statutes—but simply to direct that the master should execute the indenture; because, until that was done, the proper tribunal to determine the question (*i.e.* the magistrates) had no jurisdiction.

[They referred to the statutes 33 Geo. 3, c. 55, and 5 Vic. c. 7.]

Mr. *Bacon* and Mr. *Druce* appeared for the defendant, but were not called on.

Judgment.

The VICE-CHANCELLOR said the plaintiff had failed to show that he was entitled to the assistance of this Court; and the bill must, therefore, be dismissed, but without costs.

1861.

July 23rd.

HARROLD *v.* HARROLD.

A trust to raise by sale of a competent part of a sum of 3389*l.* bank annuities, a sum not exceeding 2000*l.*, and pay the same to the plaintiff. —*Held* not to be exhausted or fully performed by raising a sum of 1391*l.* at the plaintiff's request.

BY an indenture of settlement, dated the 28th of May, 1860, the sum of 3389*l.* 13*s.* 11*d.*, 3*l.* per cent. Bank Annuities, was assigned to trustees, upon trust, by sale of a competent part thereof, forthwith to raise a sum not exceeding 2000*l.* and pay the same to Ewen Baillie Harrold or his assigns; and also all such sums as should be required for the payment of all moneys still remaining due in respect of succession duty or otherwise; and also the costs as between solicitor and client of the said E. B. Harrold and his wife, incidental to the settlement, and the acts and negotiations preceding the same, and to stand possessed of the residue of the bank annuities after the sale thereinbefore directed to be made upon the trusts therein mentioned.

On the 4th of July, 1860, the plaintiff, Mr. Harrold, wrote and sent to the defendants, the trustees, the following notice:—

"Gentlemen,—Whereas you are directed by the indenture of settlement of the 28th of May, 1860, by sale of a competent part of the stock therein mentioned, to raise a sum of money not exceeding 2000*l.* and to pay the same to me or my assigns, I hereby request and authorise you, by sale of a competent part of the said stock, to raise for my benefit the sum of 1391*l.* 17*s.* 7*d.* only, and to pay the same for me and on my account as follows, namely, 585*l.* to my solicitor, Mr. R. Glynes, and 806*l.* 17*s.* 7*d.* to Messrs. Hilliard, Dale, and Stretton; and the respective receipts of the said Messrs. Glynes and Hilliard, Dale and Stretton, for the respective sums which I have hereby directed you to pay them, shall be binding upon me and be sufficient discharges to you for the same sums respectively."

The trustees accordingly, on the 14th of July, 1860,

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sold out 1847*l.* 10*s.* 2*d.*, part of the fund, by which they realised 1712*l.* 16*s.* 5*d.* cash, out of which they paid 585*l.* to Mr. Glynes and 806*l.* 17*s.* 7*d.* to Messrs. Hilliard, Dale, and Stretton; and the balance, amounting to 320*l.* 18*s.* 10*d.*, was applied in payment of costs and of succession duty and expenses.

Statement.

The plaintiff again applied to the trustees to cause the further sum of 608*l.* 2*s.* 5*d.*, which, with the moneys previously raised, would make up the full sum of 2000*l.*; but a doubt was raised whether the trustees were authorised to accede to his demand.

The point was now raised by a special case.

Mr. *Dymond* appeared for the trustees.

Argument.

Mr. *Bickley Rogers*, for the plaintiff, submitted that the trustees still had power to raise monies so as to make up the full sum of 2000*l.*

Mr. *Hobhouse*, for the parties interested in the settlement, submitted that the plaintiff was entitled to have one sum raised out of the fund and no more. He had elected to have a sum of 1391*l.* 17*s.* 7*d.* raised forthwith, but was not at liberty to put the estate to the expense of a second exercise of the power.

The VICE-CHANCELLOR:—

Judgment.

There is a clear declaration of trust for the plaintiff's benefit to the full amount of 2000*l.* I do not think his request to the trustees, to raise 1391*l.* only, exhausts the the trust or diminishes the amount of the fund that was impressed with a trust for his benefit. The performance of the trust does not depend on the request of the *cestui que trust*, and there are no words which amount to a release. There must be a declaration to that effect.

See *Walmesley* v. *Vaughan* (*a*).

(*a*) 3 Sm. & Gif. 353 and 2 De G. & Jones, 114.

1861.

July 3rd.

JOHNSON *v.* SWIRE.

Trustees of a settlement of a policy of assurance being without funds to pay the premiums, assigned the policy to a creditor, and afterwards assigned the trust property to new trustees appointed in their room; but the policy of assurance was not mentioned in the assignment to the new trustees.—*Held*, that the new trustees were not entitled to recover the policy as against the creditor.

THE plaintiff in this suit represented the Argus Life Assurance Company, and filed this bill, on behalf of the company, against John Swire, Edward Southam, Edward Starkey, Lewis Langworthy, and Thomas Bridge, praying that they might interplead together.

By an indenture, dated the 2nd of January, 1844, one John Southam assigned certain profits and monies to the defendants John Swire and Edward Southam upon trust to invest the same at interest in manner therein mentioned, and to accumulate and invest the interest during the life of John Southam; and after his decease to hold the said trust funds and securities in trust for such person or persons as he should by will appoint; and in default thereof in trust to pay the interest thereof to Mary Southam, his wife, for her life, and after her decease in trust for their children. The deed provided that it should be lawful for the trustees, with the consent of the said John Southam, to apply all or any part of the trust moneys or interest in effecting a policy of insurance on the life of the said John Southam, of such sum of money as the trustees, with such consent, should think proper, such policy to be held upon the trusts of the settlement. In pursuance of this authority, Messrs. Swire and Edward Southam, as such trustees, on the 24th of October, 1844, effected a policy of assurance with the Argus Assurance Company on the life of John Southam, for 1000*l.*, at a premium of 25*l.* 13*s.* 4*d.*

By an indenture, dated the 1st of June, 1846, Messrs. Frodsham and Hunter were appointed new trustees of the settlement in the room of Messrs. Swire and Southam; and the policy was assigned by the latter gentlemen to

Messrs. Frodsham and Hunter. By an indenture, dated the 2nd of November, 1847, Messrs. Hudson and William Southam were appointed trustees in the room of Messrs. Frodsham and Hunter, by whom the policy and moneys secured thereby were assigned to Messrs. Hudson and W. Southam as such trustees.

On the 15th of November, 1851, Messrs. Hudson and W. Southam, with the knowledge of John Southam, assigned the policy to the defendant Starkey, a creditor of John Southam. The defendant Starkey, in his answer, stated the transaction as follows:—That the trustees of the indenture of January, 1844, had no moneys in their hands to meet the premium on the policy which fell due on the 25th of October, 1851; that the premium was not paid, and the policy was in fact about to drop. That on the 22nd of January, 1848, he had lent the sum of 50*l.* to John Southam at interest; and in November, 1851, upon his (Starkey's) pressing for payment, it was agreed that the policy should be assigned to him in consideration of the debt, and that he should be entitled to receive the policy for his own benefit. The indenture of the 15th of November, 1851, was then prepared and executed, and by it the said policy of assurance, and all sums of money to become due or recoverable by virtue thereof, and all the estate, right, title, and interest of the said Thomas Hudson, William Southam, and John Southam therein were assigned to him Edward Starkey, his executors, &c., absolutely, together with full power and authority for him, his executors, &c., in the names of John Swire and Edward Southam, or of the said Thomas Frodsham, John Hunter, William Southam, and Thomas Hudson, to receive and give effectual discharge for all sums of money to become due upon the said policy thereby assigned, and to commence such action for the recovery of the money thereby assigned as should be deemed necessary. That after the date of the assignment, he, Starkey,

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paid the premium which accrued due on the 25th of October, 1851, and received the policy. He had continued to pay premiums to the company from that time up to and including the payment which accrued due on the 25th of October, 1859, and he claimed to be entitled to the proceeds of the policy.

On the 17th of March, 1852, Messrs. Langworthy and Bridge were appointed trustees of the indenture of January, 1844, in the room of Messrs. Hudson and W. Southam; and thereupon all the trust property (except the policy) was assigned to the said new trustees.

On the 11th of March, 1860, John Southam died, upon which Mr. Starkey applied to the company's agent at Manchester for payment of the moneys. He also furnished evidence of the death and the assignment of November, 1851. He informed the directors that the other assignments were assignments to the trustees on appointment, and were in the possession of the trustees last appointed. The directors refused to pay the moneys assured without production of the assignments, in order to see that Messrs. Hudson and W. Southam had power to assign the policy to Mr. Starkey.

On the 27th of April, 1860, the company's agent received a letter from the solicitors of the defendants, Messrs. Langworthy and Bridge, stating that they believed the policy of assurance belonged to them, as trustees of the settlement of 1844; and they afterwards sent in an abstract of their title, setting out the deeds of January, 1844, June, 1846, and November, 1847. It appeared by the abstract, that by an indenture dated the 17th of March, 1852, Messrs. Langworthy and Bridge were appointed new trustees of the indenture of 1844, in the place of Thomas Hudson and William Southam, and "all the trust estate and effects vested in the latter as such trustees" were assigned to Messrs. Langworthy and Bridge on the subsisting trusts of the settlement of 1844.

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On the 7th of September last, Messrs. Langworthy and Bridge commenced an action against the company, in the names of Messrs. Swire and Edward Southam, to recover the proceeds of the policy; and by an order made in the judge's chambers the plaintiff, Mr. Johnson, as resident director, was ordered to represent the company in the action, and he thereupon filed this bill, and obtained an injunction restraining the action.

The defendants Swire and Edward Southam, by their answer, disclaimed any beneficial interest in the money, and were willing to act with reference thereto, and to the action at law, as the Court should direct.

Messrs. Langworthy and Bridge, by their answer, alleged that John Southam by his will bequeathed to his son John Southam, an infant, all the property, subject to the trusts of the indenture of January, 1844; and they submitted that, under the circumstances, the policy of assurance became and was subject to the trusts of the will, and that they, as the present trustees, were entitled to recover the moneys and hold the same upon the trusts of the indenture. They further said that the defendant Edward Starkey, before he accepted the assignment, had full notice of the indenture of the 2nd of January, 1844, and was bound by the trusts thereof; and they had offered to pay to the defendant Starkey 50*l.*, with interest from the date of the alleged assignment, together with all premiums which he might have paid in respect of the policy and interest, upon his relinquishing all further claim, which was the most he could get even if he had held a valid mortgage of the policy; but that the defendant had declined the offer.

Argument.

Mr. *Chapman Barber* appeared for the plaintiff, and asked for the usual order in an interpleader suit.

Mr. *C. Hall,* appeared for Messrs. Swire and Southam,

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Argument.

in whose name the action had been commenced, and disclaimed all beneficial interest in the policy.

Mr. *Bacon* and Mr. *Rowcliffe*, for the defendant Starkey, contended that he was a purchaser for value, and his title could not be impeached. At the time he took the assignment, he was a creditor and entitled to be paid his debt. At that time the policy was not worth the amount of the debt, and, had he not consented to take it, it must have dropped, as the trustees had not the means of paying the premiums. After the assignment to him, the defendant Starkey paid all the premiums as they fell due; and, but for the unforeseen death of John Southam, the trustees would never have sought to disturb the transaction. It was submitted, therefore, that the defendant Starkey was entitled to the fund.

Mr. *Malins* and Mr. *Hamilton Humphreys*, for the defendants, the present trustees, contended that it was their duty to recover the property of the *cestui que trust*. It was clear that the former trustees had improperly parted with the policy to the defendant Starkey, and were responsible for their conduct; but, inasmuch as Starkey knew it was trust property, he must, in this Court, be taken to know the trusts, and could not now be permitted to set up his arrangement with the former trustees as a bar to the claim by the present trustees. It was said that the policy was of no value, and that the trustees had no funds out of which to pay the premiums; but there was no evidence to show that the then trustees had taken any steps to have the value ascertained, or to have the policy surrendered to the office.

In *Drysdale* v. *Piggott* (*a*), a creditor effected an insur-

(*a*) 22 Beav. 238.

ance in his own name, and paid all the premiums but the first, and the debtor, on being applied to, refused to pay the premiums, which the Master of the Rolls held defeated his right to the policy; but the Lords Justices reversed that decision. That was a far stronger case than this.

[The case of *Fortescue* v. *Barnett* (*a*) was referred to.]

THE VICE-CHANCELLOR:—

The present trustees have nothing to do with this question.

This policy was not assigned to them. Their predecessors in the trust assigned to them all the other trust property, but not this policy. The former trustees, in the exercise of their discretion, dealt with this policy by assigning it (upon a transaction which they thought a provident one), to the defendant Starkey, who has got possession of it under that assignment. The trustees who executed that assignment are accountable to the *cestui que trust;* but they are not accountable to the present trustees of the settlement; nor is the defendant Starkey accountable to the present trustees of the settlement for his dealing with the former trustees. The present trustees have no right to interfere or intervene at all, by making a claim which has occasioned this expensive litigation, and which I am bound to decide against them. The only question now is, as to the costs; and I am not disposed to order that the costs of the other defendants be paid by Messrs. Langworthy and Bridge. On the other hand, I am not disposed to order that their costs of the contest which they have raised shall be paid out of the proceeds of the policy, or to say that they will be justified in charging them against the trust estate in their hands.

(*a*) Myl. & Keen, 36.

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Judgment.

The order will therefore be, that no costs shall be allowed to the defendants Langworthy and Bridge; and as to the rest, the costs of the plaintiff, including those in the action at law, must be provided for out of the fund. The defendants Swire and Edward Southam being necessary parties, their costs must be taxed and paid out of the proceeds of the policy. The residue must be paid to the defendant Starkey. The injunction must be made perpetual, and the policy delivered up, on payment of the money out of court.

July 24th.

PHILLIPS *v.* PHILLIPS.

The defence of purchaser for valuable consideration without notice must be stated distinctly in the pleadings, else it cannot prevail. Therefore, where it was not claimed as a ground of defence in an answer or plea, but only in an affidavit on a motion for a decree, it was not allowed.

BY an indenture, dated the 4th of February, 1820, and made between Rebecca Phillips, widow, of the first part, John Phillips, her elder son, of the second part, and the plaintiff, William Phillips, the younger son, of the third part, reciting the death of William Phillips, the husband of the said Rebecca, on the 29th of September then last, intestate, leaving the said John Phillips his eldest son and heir-at-law, and Anne the wife of George Butcher, Rebecca the wife of James Jones, and the said plaintiff, his younger children; also reciting that, subject to a life interest therein of his widow, the said Rebecca Phillips, the said William Phillips deceased died possessed of or entitled to the reversion in fee of an estate called Grosmont Wood, subject to a mortgage thereon of 800*l.*, and was

absolutely entitled in possession for an estate of inheritance in fee to an estate called Blanaway, subject to a mortgage thereon to William Kinsey, for securing 1200*l.*; and further reciting that the personal estate of the said intestate did not amount to 500*l.*, and was subject to the payment of debts, funeral and testamentary expenses, and that the residue would be divisible amongst his wife and four children in thirds, one-third to his wife, and two-thirds equally amongst the children; that Rebecca Phillips had obtained letters of administration on the 19th of October last; and that John Phillips, the eldest son and heir, was satisfied that the mode in which the property would devolve in consequence of his father's intestacy would be contrary to his father's wishes, and that he had in consequence voluntarily agreed to make a better provision for his sisters and his younger brother, the plaintiff, William Phillips, by paying to each of his sisters 150*l.* and securing to his brother William an annuity of 20*l.* per annum from the decease of his mother Rebecca Phillips, she having consented to support the said William Phillips in the mean time, and she being empowered by the said John Phillips the elder to receive her share of the personalty, after payment of debts except those due on mortgage, in consideration whereof the younger children were to assign to John Phillips the elder all their shares in their father's personal estate.

The indenture further recited that, in part performance of such agreement, John Phillips the elder had given his note of hand to George Butcher and his wife for 150*l.*, and a like note of hand to James Jones and his wife; and also that, by an indenture of even date, in consideration of the said notes of hand and the annuity intended to be secured by the then reciting indenture, George Butcher and his wife, James Jones and his wife,

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and William Phillips the son, had assigned to John Phillips the elder their shares in the residuary personal estate of the said William Phillips deceased. And it was by the indenture then witnessed that, in consideration of the assignment, and for certain nominal considerations and natural love and affection, John Phillips the elder, by the said indenture, granted to his brother, the plaintiff, William Phillips, an annuity of 20*l.* to be yearly and every year charged and chargeable upon and issuing out of the said Blanaway estate, in the parish of Llantilio Pertholey, to have, hold, receive, and take the same immediately after the death of the said Rebecca Phillips the widow, to the plaintiff and his assigns for life, with a power of distress and entry on the said Blanaway estate; and by the same deed Rebecca Phillips covenanted that she would, during her life, at her own cost and charges, maintain and support the plaintiff, provided he continued to live with and assist her as usual in the management of her business.

By indentures of lease and release, dated the 4th and 5th of May, 1821, and executed in contemplation of the marriage which was shortly after solemnised between the said John Phillips, and his then intended wife Mary Roberts, he the said John Phillips conveyed and assigned the said messuage and hereditaments called Blanaway (subject to a mortgage for the sum of 800*l.* to William Kinsey therein named), together with other hereditaments, to Jane Roberts and William Roberts, their heirs and assigns, to the use of himself for ninety-nine years, if he should so long live, with remainder to the use of his said intended wife, during widowhood, with remainder as they should jointly appoint, and in default of joint appointment by himself and his intended wife, to the use of all and every the children of the marriage as tenants in common in fee. The deed of the 5th of May contained a covenant on the part of John

Phillips, his heirs, executors, and administrators, that the said messuages and hereditaments called Blanaway, were not subject, charged, or incumbered in title, charge, estate, or otherwise howsoever, except for the said mortgage thereon for the sum of 800*l.* to the said William Kinsey, and that the reversion and inheritance of the said messuage and hereditaments called Blanaway, subject to the said mortgage only, were then vested in him, the said John Phillips, in fee simple.

John Phillips, the settlor and grantor of the annuity, died in 1825 intestate, leaving his son, John Phillips, his heir-at-law, and George Phillips him surviving. His widow, Mary Phillips (formerly Roberts), afterwards married one John Ellis. The joint power of appointment was not exercised. On the 8th of December, 1839, Rebecca died. On the 5th of December, 1859, William Phillips, the plaintiff, filed his bill, *in formâ pauperis*, against John Phillips, as heir-at-law of the settlor, and alleging that the first quarterly payment of the annuity became due on the 8th of March, 1840, and that numerous applications had been made for payment. The bill prayed, that an account might be taken of what was due and owing to the plaintiff in respect of the annuity, and, in default of payment, that the amount might be raised by a sale or mortgage of the Blanaway estate.

John Phillips put in his answer to the bill, in which he alleged that the deed, if any, was executed without consideration, and set forth the settlement of the 4th and 5th of May, 1821, and submitted that the deed relied on by the plaintiff was void against such last-mentioned settlement. The defendant also alleged that, on his father's death without exercising the joint power of appointment, Blanaway had devolved on him and his brother George as tenants in common. He stated that a brother-in-law of the plaintiff had mentioned to him casually that there

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was a charge of 20*l.* per annum on the estate, but that he replied that he knew nothing about it. He alleged that his solicitor had applied several times to the plaintiff's solicitor to show him the deed, but without success. The defendant further submitted that, if the plaintiff had any claim, it was a legal claim and ought to be enforced in a court of law; and he further relied on the Statute of Limitations.

On the 24th of February, 1860, the bill was amended by making George Phillips a co-defendant. By his answer to the amended bill he submitted that it appeared by the recitals in the deed of the 4th of February, 1820, and it was the fact that the said deed was voluntary and made without any consideration, and that it was void against the settlement of the 4th and 5th of May, 1821, which he afterwards stated; and he claimed the benefit of the statute of the 27 Elizabeth, against fraudulent conveyances, as if he had pleaded the same to the said bill. He also claimed the benefit of the Statute of Limitations.

The cause now came on on a motion for a decree. It appeared by the evidence that the plaintiff was receiving parish relief. In 1846 he employed a Mr. Owen to act for him, but was unable to proceed for want of funds. In February, 1847, he employed Mr. Norton, of Monmouth, who wrote to John Phillips, applying for payment; but Mr. Norton was unable to set forth what reply was made to that letter. In October, 1847, he sent a notice of the plaintiff's charge on the estate to Messrs. Blount & Davies, the solicitors of the mortgagees, and also sent other notices, but refused to commence proceedings from the plaintiff's want of funds. Mary Ellis and her brother-in-law, William Roberts, swore that, neither at nor before the date of the settlement of 1821 had they any notice of the indenture of the 4th of February, 1820.

Mr. *F. Oliver Haynes* opened the plaintiff's case.

Mr. *Malins* and Mr. *John Pearson* for the defendants. *Argument.*

The defendants are entitled to claim under a purchase for valuable consideration, without notice of the plaintiff's title. Lord Eldon, in the case of *Wallwyn* v. *Lee* (*a*), said that a purchaser might say, "I have honestly and *bonâ fide* paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide*." The title of a purchaser for valuable consideration without notice is a good defence of the purchaser: *Patterson* v. *Slaughter* (*b*). In *Jerrard* v. *Saunders* (*c*), the defendant stated, as in this case, by his answer, that he was a purchaser for valuable consideration without notice; and Lord Rosslyn said: "I think it has been decided, that against a purchaser for valuable consideration without notice this Court will not take the least step imaginable" (*d*). Purchase for valuable consideration without notice is a good defence as well against a legal as an equitable title: *Bowen* v. *Evans* (*e*), *Joyce* v. *De Moleyns* (*f*), *Penny* v. *Watts* (*g*), *Attorney-General* v. *Wilkins* (*h*), *Colyer* v. *Finch* (*i*). It is sufficient if the defence of purchase for valuable consideration without notice be taken by the answer and be not pleaded: *Jerrard* v. *Saunders* (*k*). In *Rancliffe* v. *Parkyns* (*l*), Lord Eldon said, with reference to the arguments of

(*a*) 9 Ves. 24.
(*b*) Ambler, 293.
(*c*) 2 Ves. 454.
(*d*) Ibid. 458.
(*e*) 1 J. & L. 179, 263-4.
(*f*) 2 J. & L. 374.
(*g*) 1 M. & G. 150.
(*h*) 17 Beav. 285, 293.
(*i*) 5 Ho. Lds. Ca. 905.
(*k*) 2 Ves. jun. 454.
(*l*) 6 Dow. 149.

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Mr. Hart and Mr. Pepys (*a*), "Then it is said that he should have pleaded that he was a purchaser for valuable consideration without notice. If a man buys an estate, and a bill is filed, and a title shown to relief, he may plead, &c.; but if he forbears to plead, and if it turns out in the progress of the suit that he was a purchaser for valuable consideration without notice, it is too much to deprive him of the effect of that, merely because he does not stop the suit at first, if it be so in fact." In *Lincoln* v. *Wright* (*b*), it was held that, where there was no answer, it was competent to a defendant in a suit for specific performance to plead the Statute of Frauds orally at the hearing. They argued, secondly, that the plaintiff was not a purchaser for value, and that the deed of February, 1820, was voluntary.

Judgment.

THE VICE-CHANCELLOR:—

It does not appear that this was a voluntary deed. Then, as to the defence of purchase for valuable consideration without notice, in the first place, it has not been pleaded It might have been pleaded by a formal plea with an averment of no notice, supported by an answer also denying notice. If that course had been taken, the question would have been fairly put in issue. The plaintiff would have been enabled fairly to meet the question, and both parties would have had an opportunity of supporting or denying the allegation by evidence. It is argued that, upon a motion for decree, the answer must be treated as an affidavit. That has nothing to do with this question. A defendant who insists upon the defence of purchase for valuable consideration without notice is bound to make out that defence in the regular way; and it would be highly dangerous to break

(*a*) 7 Dow. 230. (*b*) 4 De G. & J. 16.

through this well-known rule. The effect would be to bring the practice upon motions for decree into discredit. It was never intended by the Legislature that either the plaintiff or the defendant should be deprived of the privilege of having questions fairly stated and fairly put in issue. It has been said, that the Court of Appeal has decided that upon a motion for decree, a defendant may plead the Statute of Frauds orally. No authority has been shown for that proposition, and, as I am not aware of any authority of the kind, I must decline to adopt any such rule. But even if the defence of purchase for valuable consideration without notice could be entertained in this case, want of notice has not been properly proved. The defence set up is, that upon the marriage of certain persons this estate, subject to a charge, was settled; but, as to the issue of the marriage, who set up this defence, they never could have had notice, because they were unborn persons at the time when the consideration passed. It was at first said that the deed itself proved there was no notice; but that is preposterous. It contained a covenant that the estate was free from incumbrances, except those specifically mentioned; that is to say, there were certain incumbrances excepted in the covenant against incumbrances. But that is not such evidence as the court can act upon in a defence of this kind. What is the other evidence? The brother of the wife, who was one of the trustees, swears he had no notice of these incumbrances; and the mother of the defendants, who was the wife of the settlor, and who was the real purchaser for valuable consideration, says that she had no notice. That is very likely; but it is not enough for the Court to act upon. This settlement is dated in the year 1821, now forty years ago. Constructive notice is as good as actual notice in a question of this kind. But can this court, on a

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simple affidavit of the wife that she had no notice of the annuity, venture to say that want of notice has been proved?

But I do not intend to decide the case upon that ground. I decide it upon this, that there is no plea of purchase for valuable consideration without notice, such as this court can act upon. If it had been pleaded properly as a defence, then the question as to the nature of the purchase, and as to the want of notice, could have been made the subject of evidence on both sides. That has not been done, and therefore the question has not been properly put in issue. What the effect would have been if this had been done, and if the question of constructive notice had been properly put in evidence, is now an idle speculation. It is enough for me to find that the answer makes no such defence. Lord Eldon has been appealed to as having said in the House of Lords, as to a defence of purchase for valuable consideration without notice, that, although it be not pleaded at all, if the fact appears in the course of the proceedings, the court is bound to treat it as pleaded. Lord Eldon never said anything of the kind; he never could have said anything of the kind. All that Lord Eldon said in *Rancliff* v. *Parkyns* was, that if the fact of purchase for valuable consideration, without notice, although not pleaded, appeared in any stage of the case, it would be too much for the court to say it would take no notice of it. That was upon a question of election, and not upon a defence, when there was a right set up to an estate. In this case this unfortunate pauper, who appears to have been for many years without his annuity, is, in my opinion, entitled to a decree to recover it. There must be a declaration that the plaintiff is entitled to have the arrear of his annuity raised

out of the Blanaway estate; an account of what is due to him; and an order that the amount with his costs of the suit be raised by sale or mortgage of the estate, with liberty to apply.

NICHOLSON *v.* PATRICKSON.

July 4th.

A testatrix, having made specific gifts of chattels, gave a small annuity and pecuniary legacies to various persons, and to charities, and bequeathed her residuary estate among the persons whose legacies did not exceed 200*l.*—*Held*, that the specific legatees of chattels and the charities were not entitled to share in the residue, but that an aged legatee of an annuity of 36*l.* a year, valued at 146*l.*, was entitled to a share of the residue.

ISABELLA NICHOLSON, by her will, dated the 8th of October, 1846, devised all her lands and real estate at Houghton Town Head, in the county of Cumberland, to three trustees in trust for the defendant Robert Patrickson, for his life, remainder to his children successively in tail male, with remainder over. The testatrix also gave and bequeathed to Letitia Patrickson and to Margaret Patrickson, an annuity of 15*l.* each for their joint lives, te be charged upon and issuing out of the said real estate at Houghton Town Head; and from and after the death of either of them, the testatrix bequeathed an annuity of 20*l.* to the survivor of them for her life, to be charged upon the same estate. To Messrs. William Patrickson and Hugh Patrickson the testatrix bequeathed a legacy of 500*l.* each, with the proviso that, "in case either of them, under the limitations of the will, should become entitled to her real estate at Houghton Town Head, as tenant for life in possession, then the said legacy given to him who should first become so entitled should be equally divided between the widow and the daughters of the defendant Robert Patrickson; and in case William

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Patrickson should, under the limitations of the will, become entitled to the said estate as tenant for life in possession, and die without leaving a son, the said legacy of 500*l.* bequeathed to Hugh Patrickson should be divided between the widow and daughters of William Patrickson. The testatrix then, after giving a power to the tenant for life for the time being of the real estate at Houghton Town Head, to lease the same, gave and bequeathed to several legatees, named in the will, legacies in sums varying from 19*l.* 19*s.* to 800*l.* (and amongst others a legacy of 300*l.* to Letitia Patrickson), amounting in the whole to the sum of 6220*l.* The testatrix also gave to each of the first cousins of the late John Phillips living in England at the time of his death a legacy of 200*l.*, and subject thereto gave and devised all her messuages, lands, tenements and hereditaments, and real estate at Close House, and Linstock, and at Crosby-upon-Eden, unto her trustees, their heirs and assigns, upon trust to sell and dispose of the same, and to apply the moneys to arise from such sale towards the payment of her just debts, funeral and testamentary expenses, the several legacies thereinbefore given and bequeathed, and the legacies thereinafter bequeathed to her executors, in aid of her personal estate, and, subject thereto, she directed and declared that such moneys should form part of her residuary personal estate.

The testatrix then made specific bequests of certain portraits, &c., and directed her executors to sell and convert into money her household furniture and effects, and to apply the proceeds of the said sale in the same way as she had directed the proceeds of her real estates at Close House, Linstock, and Crosby-upon-Eden.

The testatrix then gave and bequeathed the sum of 200*l.*, payable out of her pure personal estate, to the

resident clergyman and churchwardens of the township of Houghton for the time being, upon trust, to invest the same as therein mentioned and to apply the interest, dividends, or other annual income of the same, as they should think fit, for the benefit of poor and indigent persons residing in the said township; also the sum of 100*l.*, payable out of her pure personal estate, unto the vicar and churchwardens of the parish of Crosby-upon-Eden for the time being, upon trust, to invest the same and to apply the interest, dividends, or annual income thereof as they should think fit for the benefit of poor and indigent persons residing in the said parish; also the sum of 100*l.*, payable out of her pure personal estate, to the vicar and churchwardens of the parish of Stanwix for the time being, upon trust to invest and to apply the interest, dividends, or other annual income thereof, for the benefit of poor and indigent persons residing in the said parish; also the sum of 200*l.* to the vicar and churchwardens of the parish of Crosby-upon-Eden; and 100*l.* to the vicar and churchwardens of the parish of Stanwix, payable in like manner out of her pure personal estate; and the interest and dividends thereof to be applied for the purposes of the schools respectively. Testatrix then bequeathed legacies for the benefit of other schools, infirmaries, missionary societies, and for the purpose of building a new church; and the sum of 100*l.* to each of her executors as compensation for the trouble they might have.

The testatrix then gave and bequeathed the residue and remainder of her personal estate unto and equally among the persons whose legacies did not exceed the sum of 200*l.*

By a codicil to her will, dated the 3rd of June, 1850, the testatrix gave several legacies of 100*l.* and 50*l.* each among various persons, and also gave the legacy of 300*l.*

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given by her will to Letitia Patrickson, among the children of Letitia Patrickson, she having died in the lifetime of the testatrix.

Statement.

The testatrix died on the 15th of January, 1854, leaving the defendant Robert Patrickson her heir-at-law; and in June, 1854, her executors duly proved the will and codicil. All the debts had been paid.

There were a great number of legatees whose legacies were under 200*l.* In July, 1858, a decree was made, and several inquiries subsequently directed; the result of which was, that the specific bequest of chattels to Thomas Phillips was estimated below 200*l.*, and the annuity of 20*l.* a year given to Margaret Patrickson was valued at 146*l.* 13*s.* 8*d.*; that two legatees of 100*l.* each had died in the lifetime of the testatrix.

Several questions were raised whether the following legatees were entitled to participate in the residuary gift:—The specific legatee of chattels, the children of Letitia, the annuitant, the legatees who died before the testatrix, the legatees mentioned in the codicil, and the charitable legatees.

Argument.

Mr. *Craig* and Mr. *Bedwell* appeared for the trustees.

Mr. *Hobhouse*, for the charitable legatees, submitted that there was nothing in the language of the will to exclude the charitable legatees from participating in the share of the residue. The will put them on precisely the same footing.

Mr. *Bacon* and Mr. *Bagshawe*, Mr. *John Pearson* and Mr. *Osborne Morgan*, appeared for several of the legatees, and claimed to participate in the residue.

Mr. *Greene* and Mr. *Deere Salmon* appeared for the next of kin.

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Argument.

Mr. *Berkley*, for the heir-at-law, contended that the personal estate was primarily liable for the payment of debts and legacies.

[The following cases were cited:—*The Attorney-General* v. *Parsons* (*a*), *Myers* v. *Perigal* (*b*), *Evans* v. *Evans* (*c*), *Collis* v. *Robins* (*d*), *Edwards* v. *Hall* (*e*), *Linley* v. *Taylor* (*f*), Jarm. on Wills (*g*).

THE VICE-CHANCELLOR:—

Judgment.

Many of the questions as to the true construction of this will and codicil are very difficult; but, upon the whole, I am of opinion that the testatrix did not intend that the specific legatees of chattels should take any part of the residuary estate. The first cousins of John Phillips, who are entitled to legacies, I consider to be those only who were living at the death of the testatrix; and the legacies which would have belonged to those who died before the testatrix, had they survived her, form part of the residue, and have not lapsed for the benefit of the next of kin. Margaret Patrickson, to whom an annuity of 20*l.* has been given, is, I think, entitled to a share of the residue. The legacies bequeathed to the two legatees *nominatim*, who died before the testatrix, have lapsed, and belong to the next of kin. The legatees named in the codicil are not, I think, entitled to any part of the residue. With respect to the charitable legatees, I think, looking at the context of the will, that the testatrix meant to give the residue of her property to the individuals named in the will only, and not any to the trustees of charities; but it is impossible to speak with confidence upon the question. The testatrix appears to

(*a*) 8 Ves. 186.
(*b*) 16 Sim. 533.
(*c*) 17 Sim. 86.
(*d*) 1 De G. & Sm. 131.
(*e*) 11 Hare, 1.
(*f*) 1 Giff. 67.
(*g*) Vol. i. p. 181, 184, 187, 188.

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have intended that the real and personal estates should form one common fund; and it must, accordingly, be applied in payment of the debts and legacies rateably.

July 24th.

HUNTER *v.* BAXTER. *Re* W. FREER'S ESTATE.

Where a judgment has been recovered against executors for a debt due from their testator, and they paid the debt, the executors are entitled to be allowed such payment, although the Statute of Limitations might have been set up against the creditor who recovered the judgment.

WILLIAM FREER, the testator in the cause, died on the 25th of September, 1857, having by his will given his residuary estate to Messrs. Baxter, Roe and Baker, his executors named therein, upon trust for the benefit of children and grandchildren. Shortly after his death, the testator's marriage settlement (dated in 1804) was found, under which his children took certain interests. Prior to his death, the testator had been indebted to Mr. Baxter, his solicitor.

On the 26th of July, 1858, Mr. S. S. Baxter (who was a solicitor in partnership with his son, one of the executors) commenced an action to recover a debt alleged to be due to him from the testator, which, according to the indorsement in the writ, was as follows:—

	£	*s.*	*d.*
April 20, 1849.—Balance due to this date, for money lent and money paid by the plaintiff for the said W. Freer during his life	412	11	4
Nine years' interest on the above, at *5l.* per cent. to the 20th of April, 1858 . .	185	8	0
March 5, 1858.—Balance due to this date, for money lent and money paid by the			

plaintiff for the said William Freer during his life, and for money received by the said William Freer for the plaintiff's use	159	10	4
	£757	9	8
Interest at 5*l.* per cent. on 514*l.* from the 20th of April, 1858, to date of judgment.	0	0	0
2*l.* 15*s.* costs.			

The executors confessed judgment in the action, and a garnishee order was obtained against them on the 11th of August, 1858. On the 19th of October the sum of 775*l.* 2*s.* 6*d.* was paid by the executors to Mr. S. S. Baxter.

In November, 1859, a summons was taken out by a legatee to administer the testator's estate.

In the cause the trustees of the settlement proved their debt, amounting to 4331*l.* 11*s.* 5*d.*, and, by an order of the 11th of March, 1859, obtained liberty to attend the proceedings. In taking the accounts of the executors before the chief clerk, it was objected, on behalf of the trustees of the settlement, that the executors had notice, on the 10th of July, 1858, that the claims of the parties interested under the settlement would be insisted upon, and no payment made by them after that date to simple contract creditors should be allowed. The chief clerk thereupon disallowed the claim.

On the 13th of July, 1859, the cause came on for further consideration, when it was ordered (*inter alia*) "an inquiry be made whether there was any, and what, debt due by the testator, William Freer, at the time of his death, to Mr. Stafford Stratton Baxter, who had obtained payment by legal process of the sum of 775*l.* 2*s.* 6*d.* out of moneys belonging to the defendants D. Baxter, H. Roe, and J. Baker, as executors of the said testator; and the Court declared, that the said last-named defendants

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were entitled to stand in the place of the said Stafford Stratton Baxter in respect of what, if anything, should be found to have been due to him at the time of the testator's death, with interest thereon at the rate of 6*l.* per cent. per annum, from the 23rd of November, 1858, the date of the decree in the cause, and were to receive the same satisfaction out of the testator's real and personal estate as the said Stafford Stratton Baxter would have been entitled to receive if he had not obtained payment, but had proved his debt in the suit."

On the 28th of June, 1861, the chief clerk certified, amongst other things, as follows:—"A simple contract debt of 772*l.* 1*s.* 8*d.* was due by William Freer, the testator, at the time of his death, to Mr. Stafford Stratton Baxter; but there had not been any acknowledgment in writing by the said testator of such debt, or any payment in respect thereof within six years prior to his death."

Argument.

Mr. *Bacon* and Mr. *Hardy*, for the plaintiff.

Though the executors declined to plead the Statute of Limitations, the plaintiffs had a right to do so: *Moodie* v. *Bannister* (*a*). In *Shewen* v. *Vanderhorst* (*b*), where the executors refused to interfere, a residuary legatee was held entitled to take advantage of the statute.

The executors, having had notice on the 10th of July, 1854, of the specialty debt due on the settlement of 1804, must be held to have paid the simple contract debt due to the father of one of them at their own risk. The executors could be in no better position than Mr. Baxter would have been. Their rights were in fact the same. The order of July, 1859, declared that they were entitled "to stand in the place of Mr. Baxter."

(*a*) 4 Drew. 432. (*b*) 1 R. & M. 347.

Mr. *Malins* and Mr. *W. Pearson*, for the executors.

Argument.

Although an executor might set up the statute, he was not bound to do so, *Stahlsmidt* v. *Lett* (*a*); and, on the same principle, he was entitled to retain his own debt (*b*), *Hill* v. *Walker* (*c*). The creditor had a judgment against them, and by means of a garnishee order attached the money in their hands, and they were compelled to pay it over.

Mr. *Taylor*, Mr. *S. Smith*, and Mr. *De Gex* appeared for other parties.

Judgment.

The VICE-CHANCELLOR said, he was not aware of any authority to justify the proposition that, where judgment had been recovered against executors for a debt due by the testator, the Statute of Limitations could be afterwards set up in an administration suit.

(*a*) 1 Sm. & G. 415 (*b*) Ibid. (*c*) 4 K. & J. 166.

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July 19*th*.

In re M. N. HORWOOD'S ESTATE; THE VICTORIA STATION AND PIMLICO RAILWAY ACT, 1858; CAROLINE GREENE AND HER CHILDREN.

Where a railway company took certain real property vested in trustees for a married woman and her children, and paid the money into court, the Court declined, under the 69th and 78th sections of the Lands Clauses Consolidation Act, to direct the fund to be paid to the trustees.

THIS was the petition of Caroline Greene, widow, and Henry Morgan and William C. Humphreys, trustees, and it prayed, that the sum of 1000*l.* standing to the account of the Victoria Station and Pimlico Railway Act, 1858, might be paid to the petitioners, the trustees; and that the company might pay the costs of the petitioners. The petitioner stated, that Mary Noble Horwood, by her will, dated the 5th of February, 1848, gave and bequeathed to Henry Morgan and one Thomas Neville, their executors and administrators, a house, No. 41, Lower Belgrave Place, Pimlico, upon trust to pay the rents into the proper hands of Caroline Greene for life, for the maintenance of herself and her children, other than her son Charles Greene, who was amply provided for, and from and after her decease, upon trust to sell and dispose of her said premises, together or in parcels, either by private sale or public contract. The testatrix died on the 19th of May, 1849. By an order of the Vice-Chancellor in the cause of *Horwood* v. *Griffith*, and in the matter of the Trustee Act, 1850, dated the 5th of August, 1853, on the petition of the said Henry Morgan, it was ordered that R. W. Heneker be appointed a trustee of the wills and codicils of the said testatrix; and it was further ordered, that all the leaseholds, tenements, and hereditaments, including No. 4, Lower Belgrave Place, Pimlico, given by the testatrix in trust for Caroline Greene, and should vest in the said H. Morgan and R. W. Heneker. By an indenture, dated the 24th

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of December, 1860, W. C. Humphreys was appointed trustee in the room of Heneker, desirous of retiring from the trust, and the said leaseholds were assigned to such trustees on the trusts of the said will. Under the Victoria Station and Pimlico Railway Act, 1858, incorporating the Companies Clauses, the Lands Clauses, and the Railways Clauses Consolidation Acts, the company became entitled to take, for the purpose of the Act, the house No. 41, Lower Belgrave Place, Pimlico, and caused the property to be valued, under the 9th section of the Lands Clauses Act, by an able practical surveyor, in conjunction with one appointed by the tenant for life; and on the 11th of June, 1861, they paid into the Bank 1100*l.*, being the amount of such valuation, and the trustees duly executed a proper conveyance of the property to the railway company.

Statement.

Mr. *De Longueville Giffard* now asked, that the money might be paid to the trustees to whom the property taken by the company had been assigned by the direction of the Court. Under the order of the Court, all the property given by the will for the benefit of Caroline Greene and children had been conveyed to the trustees; and it would be extremely inconvenient to have a small part of the property separated from the remainder by being locked up in the Court of Chancery.

Argument.

Mr. *Wickens*, for the railway company, submitted that the Court had not jurisdiction under the Act to make the order asked. Where money had been paid in respect of lands taken from persons under disability, the Court, under the 60th section of the Lands Clauses Consolidation Act, 8 Vic. c. 18, had power to order the money to be applied, first, to the purchase or redemption of the land tax, or debts, or incumbrances affecting the same, or other land settled to the same uses; secondly, in purchase of

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other lands to be settled to the same uses; thirdly, in replacing buildings taken by the railway; and fourthly, in payment to the party becoming absolutely entitled. The present case came within none of these provisions.

Argument.

Mr. *De L. Giffard*, in reply, submitted that the 78th section authorized the Court to make such orders as it thought fit (*a*).

Judgment.

The VICE-CHANCELLOR said, he thought he ought not make the order for payment to the trustees. The proper order would be for the investment of the fund in the ordinary way, the company to pay the costs according to the Act.

(*a*) 7 & 8 VIC. c. 18, s. 78.—"Upon the application by petition of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been so deposited, or any part of such, or any interest in the same, the Court of Chancery in England, or the Court of Exchequer in Ireland, may, in a summary way, as to such Court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such Court shall seem meet."

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Gift of residue on trust to pay the dividends to the testatrix's son for life (except what was required for education of her son's children); and should her son die before all or any of his children should attain twenty-one, she wished each child to receive their share on attaining twenty-one; but, should all his children die before himself, at his death then over.—*Held*, that a child who died an infant in the lifetime of the son had not acquired a transmissible interest.

ANN CHADWICK, by her will, dated the 19th of May, 1846, after bequeathing certain pecuniary and specific legacies and appointing three of the defendants executors, made the following disposition:—"I wish my son Samuel Beckett Chadwick to select what farming stock, furniture, &c., he wishes to take, and the remainder to be sold by my executors and trustees, and place the proceeds to my other property, which I give to my before-mentioned executors and trustees, upon the following trusts: first, to give to my son Samuel Beckett Chadwick 2000*l.*, and then to place out at interest the remainder of my property, and to pay such interest annually to my son Samuel Beckett Chadwick, unless any part of such interest may be wanted for the education of my grandchildren, and in such case I give my executors and trustees power to withhold such sum for that purpose; and, should my son die before all or any of his children come of age, I wish each child to receive their share on attaining the age of twenty-one years; but, should all his children die before himself, at his death I wish my executors and trustees to divide the property equally amongst the descendants of my aunts and uncles of both my father's and mother's side, each family to take their father's and mother's share."

The testatrix died on the 15th of September, 1846, leaving Samuel B. Chadwick her only child and sole next of kin. The executors paid the legacies and ascertained the personal estate to be about 17,760*l.*, the income of which the executors paid to S. B. Chadwick during his life. S. B. Chadwick died on the 18th of January, 1856, intestate, leaving five children, infants, him sur-

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viving. One of his children, S. A. B. W. Chadwick, died in 1848, in his lifetime, aged four.

Statement.

The question now was, whether the personal representative of the deceased child was entitled to share equally with the surviving children in the residuary estate given by the will of the testatrix.

Argument.

The bill was filed for the administration of the testatrix's estate, and asked that the rights of the parties might be declared, and for the appointment of a guardian and the allowance of a proper maintenance.

Mr. *Cole* and Mr. *Rigby*, for the plaintiffs, contended that the representative of the deceased child was not entitled to participate.

Mr. *Malins* and Mr. *Kay* contended that the representative of the deceased share was entitled. In *Re Yates's Trust* (*a*), where a testator bequeathed money in trust for A. for life, and after her death for her children on attaining twenty-one, or as to her daughters on marriage, and in case any of A.'s children should die before being entitled in possession to his or her or their shares, then over, Vice-Chancellor Parker held, that the death of a child in A.'s lifetime did not defeat the interest he acquired on attaining twenty-one.

[*Hallifax* v. *Willson* (*b*), *Williams* v. *Clarke* (*c*), and *Parker* v. *Golding* (*d*), were cited.]

THE VICE-CHANCELLOR:—

Judgment.

The Court always endeavours to construe the language so as, if possible, to give vested interests to all the children who are the objects of a testator's bounty. This will is framed in extremely precise language—not only precise,

(*a*) 16 Jur. 78.
(*b*) 16 Ves. 168.
(*c*) 4 De G. & S. 472.
(*d*) 13 Sim. 418.

but so concise that there are no materials in the context to authorize the construction that there is a gift to any child who did not survive the tenant for life. But it is very clear that those who did survive him are to receive their shares at twenty-one, and not before. It is clear, from the precise language of the will, that if all the children had died before the tenant for life, the property would have gone over to the descendants of other persons. The words in the will, "should all his children die before himself," seem to me to include all children, whether over or under twenty-one years of age. The true construction of the will seems to be, that no child took a vested interest other than those who survived the tenant for life. The declaration, therefore, will be, that the child named Samuel Allen Beckett Whiteway Chadwick did not take a share of the residuary personal estate of the testatrix.

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July 19th.

Re THE NORTH STAFFORDSHIRE RAILWAY COMPANY AND THE LANDS CLAUSES CONSOLIDATION ACTS.

Ex parte VAUDREY'S TRUSTS.

A railway company having taken certain settled hereditaments and paid the purchase-money into court, ordered to pay the costs of an intended investment of which the Master approved, but which was afterwards abandoned.

JOHN VAUDREY, by his will, dated the 21st of November, 1827, gave and devised certain real estates to the use of Anne Hall, the petitioner, for her life, for the term of ninety-nine years, remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Anne Hall in tail male remainder over, &c.

John Vaudrey died on the 10th of March, 1828.

In 1849, the North Staffordshire Railway Company agreed to purchase certain portions of the lands comprised in the testator's will, and, on a conveyance being executed by Anne Hall, paid the purchase-money, consisting of 6202*l.* 15*s.*, into court.

The trustees and Anne Hall purchased at a sale by public auction, with a view to investing the money paid into court, certain pieces of lands for 504*l.* and 229*l.* 10*s.* respectively. The usual reference was made to the Master, who approved of the title; but it was ultimately thought that considerable expenses would be incurred by perfecting the title, and the purchase was abandoned; and in August, 1852, the two sums, amounting to 770*l.*, were ordered to be invested in Consols.

In March, 1861, the parties beneficially interested under the will executed a disentailing assurance, and now presented a petition for the payment out of court of the sum of 770*l.*

The petition stated that, in consequence of the expense of making a perfect title, the purchase had been abandoned, and the moneys had remained invested in Consols.

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Re THE NORTH STAFFORDSHIRE RAILWAY COMPANY AND THE LANDS CLAUSES CONSOLIDATION ACTS. *Ex parte* VAUDREY'S TRUSTS.

The petition asked that the sum of 770*l.* stock, which had been purchased with a sum of money paid in by the North Staffordshire Railway Company, as the purchase-money of certain lands taken by them, might be paid to the petitioners, and that the company might be ordered to pay the costs of the petitioners incident to the purchase and taking of the lands sold to the company, including therein the costs of and incident to two abortive purchases, and of a disentailing deed, and the costs of the application and all proceedings relating thereto.

Statement.

The question now raised was whether the railway company was liable to pay the costs of the abortive attempt to invest the fund in land.

Argument.

Mr. *Malins* and Mr. *Ince*, for the petitioners, contended that the company was bound to pay the costs of the abortive purchases. The Courts, though at first doubtful, had decided that costs of an unsuccessful attempt to invest the moneys paid in being made *bonâ fide* must be paid by the company.

Mr. *Broderick*, for the railway company, contended that the costs of abortive purchases were not within the meaning of the Act of Parliament (The Lands Clauses Consolidation Act, s. 80). In a recent case the Master of the Rolls had decided expressly that the company were not liable for such costs.

THE VICE-CHANCELLOR:—

Judgment

Both of the Masters to whom the proposed purchases were made have approved of the purchases, and have reported that a good title could be made. I assume, therefore, that the endeavour to invest the fund was proper. The abandonment of the purchase was on a reasonable ground; and the whole course of conduct as

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Re THE NORTH STAFFORDSHIRE RAILWAY COMPANY AND THE LANDS CLAUSES CONSOLIDATION ACTS. *Ex parte* VAUDREY'S TRUSTS.

Judgment.

to the abortive attempt to invest, was fair and *bonâ fide.*

These proceedings are, in the language of the statute, proceedings relating to the re-investment of moneys; they were proceedings of a reasonable and proper kind, and the costs of them must be paid for by the company.

June 2nd & 3rd.

MORGAN *v.* STEPHENS.

The agent employed by a trustee is not accountable so long as his acts are merely acts of agency; but where a solicitor got possession of the trust moneys, and allowed the executrix, who was entitled to the income only, to misapply the principal, the Court directed an account against him as if he were a trustee.

THIS bill was filed by Thomas Morgan against Edward Stephens (who had been the solicitor of Ann Phillip, the widow and executrix of Thomas Morgan, the testator), and William Phillip, her second husband, for the purpose of making the defendant Stephens liable for the breaches of trust committed by the said Ann Phillip with his knowledge and assistance.

The bill, in addition to the ordinary administration decree, prayed as follows:—

2. That an account might be taken of the testator's personal estate not specifically bequeathed, and of the income received by his executrix or by Edward Stephens, or either of them, in the lifetime of the executrix, or by any person by their order or for their use.

3. That an account might be taken of the personal estate of the testator not specifically bequeathed, and of the income thereof received by the defendant Edward Stephens since the death of Ann Phillip, or by any person by his order or for his use; and also of the goods, chattels, and effects comprised in the said agreement, and intended to be assigned by the said indenture of settlement, and of the funds thereof possessed or received by

the said Edward Stephens, or by his order or for his use.

6. That in taking the said account, the said defendant Edward Stephens might be charged with all moneys as lent by him upon improper or insufficient securities, and that he might be disallowed all payments made by him contrary to the trusts of the said will; and that he might be decreed to account and pay as the Court should direct what, upon taking the account aforesaid, should appear to be due; and that the defendant Phillip, as the legal personal representative of Ann Phillip, deceased, might be decreed to answer and satisfy out of the assets of the said Ann Phillip what should be found due from her estate; or, if he should not admit assets, that the usual accounts might be taken, &c. &c.

The testator, by his will, dated the 28th of August, 1831, made the following disposition:—

"This is the last will and testament of me, Thomas Morgan, of the parish of Pentyrch, in the county of Glamorgan, farmer. I give and bequeath unto my granddaughter Ann John the sum of 50*l.*, and unto my grandson John John the sum of 25*l.*, to be paid in two months after my decease. I also give and bequeath to my son Evan Morgan the sum of 200*l.*, to be paid in twelve months after my decease. I also give and bequeath unto my wife Ann all and singular my household furniture, farming stock, and crops for her own sole use absolutely; all the rest and residue of my personal estate, of what nature or kind soever, I give and bequeath to my said wife Ann, Edward Jenkins, of Fynon Wen, and John Thomas, of Llwyn Yolley, upon trust, to call in all moneys due to me at interest or otherwise; and after payment of the above-mentioned legacies, to lay out and invest the same in real or other good security, and apply the interest and proceeds thereof towards the maintenance and education of my son Thomas and the child my wife

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is now pregnant with, until they shall severally attain the age of twenty-one years; and upon their attaining that age, then upon trust to pay over and divide the principal money equally between the two children, share and share alike. And, lastly, I do hereby nominate, constitute, and appoint my said wife and the said Edward Jenkins and John Thomas joint executrix and executors of this my will, and guardians of my said last-mentioned children during their minorities respectively."

The testator died in August, 1832, and his will was proved by his executrix alone. At the date of the will his wife was pregnant, and shortly afterwards was delivered of twins, who died in the testator's lifetime. At his death the testator left living three sons and two grandchildren.

The amended bill contained the following allegations:—

"6. The said testator was at the time of his death possessed of leasehold and personal estate of considerable value, and upon or shortly after his death Edward Stephens, of the parish of Lavernoch, in the county of Glamorgan, solicitor, a defendant hereto, with the privity and consent of the said Ann Morgan (since deceased), and as her agent, entered into possession or into receipt of the rents and profits of the said leasehold estate, and possessed himself of the personal estate of the said testator not specifically bequeathed by his said will; and the said defendant Edward Stephens thereout paid the funeral and testamentary expenses and debts of the said testator, which were of small amount in the whole, and the legacies bequeathed by the said will; and after such payments there remained in the hands of the said defendant Edward Stephens a considerable surplus or residue of such personal estate, to one moiety of which the plaintiff was entitled under the said will, and the other moiety of which was divisible between the plaintiff and the other next of kin of the said testator; and the plain-

tiff's said moiety, and his distributive share of the other moiety, ought to have been laid out and invested in Bank 3*l.* per Centum Annuities for the benefit of the plaintiff during his minority.

"7. The said defendant Edward Stephens, however, retained the said surplus or residue of the personal estate of the said testator in his hands for some time, and then, assuming to act as if he were a trustee of the said will, he lent and advanced the sum of 800*l.*, part thereof, to divers persons upon various securities in his own name, and he from time to time received the interest which accrued due on such securities; and he pretends that he from time to time accounted for and paid to the said Ann Morgan (since deceased) during her lifetime interest on such residue.

"8. The defendant Edward Stephens also alleges that he from time to time in the lifetime of the said Ann Morgan (since deceased) called in the said moneys which he had so invested as aforesaid, and reinvested the amount in his own name upon other securities of a like nature, and that he received and accounted to the said Ann Morgan (since deceased) for the income of such last-mentioned investments respectively."

The bill further alleged that, in 1837, the executrix Ann Morgan married the defendant William Phillip; and that on such marriage it was agreed between the said Ann Morgan and the defendant William Phillip, with the privity of the defendant Stephens, that 800*l.* of the residue of the testator's estate then invested in Stephens's name, with certain leaseholds, articles of furniture, plate, linen, china, horses, cows, oxen, pigs, and other farming stock, and the crops on the premises, also forming part of the personal estate of the testator, should be assigned to the defendant Stephens upon trust to pay the rents and profits and interest and dividends to the said Ann Morgan for her separate use, to be applied for maintenance and

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education of the testator's son Thomas Morgan until twenty-one, and then to assign the principal, &c., to the said Thomas Morgan.

The bill alleged that a settlement was prepared in conformity with this agreement, and remained in the possession of the defendant Edward Stephens. The bill further alleged, that at the time the said indenture was prepared the plaintiff Thomas Morgan was an infant; that the defendant E. Stephens was in possession of the said 800*l.*, and shortly afterwards entered, in part performance of the agreement, into possession or into receipt of the rents and profits of the leasehold premises of the testator, and possessed himself of the goods and chattels and effects comprised in and expressed and intended to be assigned by the indenture, and made divers payments in respect of the annual income of the trust premises to the said Ann Morgan during her life.

On the 11th of June, 1844, Ann Phillip died, leaving the defendant her legal respresentative.

The bill alleged as follows:—

From the death of the said Ann Phillip, in the year 1844, until the year 1859, there was no legal personal representative of the said testator, but the said defendant Edward Stephens continued to receive the income of the said residuary personal estate of the said testator as it became due; and he, from time to time, called in parts of the said sum of 800*l.*, and reinvested the same on other securities, and he now alleges that the whole of the said sum of 800*l.*, although lent by him on personal security, has recently been paid off.

The said defendant, Edward Stephens, received the residuary personal estate of the said testator, and invested the said sum of 800*l.*, part thereof as aforesaid, with full knowledge and notice of the trusts to which the same was subject under the said will, and he well knew that the investment of any part of the said trust fund

on personal securities, as aforesaid, was a breach of trust.

The plaintiff charges that the said defendant, Edward Stephens, is in equity a trustee of the residuary personal estate of the said testator Thomas Morgan, deceased, so possessed or received by him, as aforesaid, as to one moiety for the plaintiff Thomas Morgan, and as to the other moiety for the plaintiff, and the other next of kin of the said testator Thomas Morgan, and that he is also a trustee for the plaintiff of the said chattels and effects, by the same indenture agreed to be assigned, or of the proceeds thereof, or of such parts thereof as have been sold.

And the defendant Edward Stephens will sometimes admit that he received and held the said sum of 800*l.* and the securities for the same and other the premises as a trustee for the plaintiff Thomas Morgan, but then he pretends that he, from time to time, during the lifetime of the said Ann Phillip, advanced or paid to her, or by her order, or for her use, divers sums of money to a large amount in the whole, which he claims to set-off against the said trust moneys, but the plaintiff charges that the said defendant Edward Stephens had full knowledge and notice that the said sum of 800*l.* and other the moneys aforesaid were trust moneys as aforesaid, and the plaintiff charges that the payments or advances made by him, the said defendant Edward Stephens, to the said Ann Phillip, and which he claims to set off as aforesaid, were made on account of income, and were made and applied for the private purposes of the said Ann Phillip, and not for the purposes of the said will, and the defendant Edward Stephens well knew before, and at the time of such advances and payments, as aforesaid, that they were not to be applied to the purposes of the said will, but to the private purposes of the said Ann Phillip, or of her said husband, or contrary to the trusts of the said will.

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Statement.

The defendant Stephens, by his answer to the amended bill, said that shortly after the testator's death, Ann Morgan employed him as her solicitor, and intrusted him as such solicitor to invest at interest moneys which she, as executrix, placed in his hands, and to call in other moneys owing to the testator's estate, all of which moneys he invested and called in accordingly, and the amount in the whole was 1141*l.* 15*s.* 8*d.* In his capacity as solicitor he received the annual interest and proceeds of the said investments for the time being, and paid them over to the executrix, or on account of her estate as such executrix, or so much of them as for the time being corresponded with the portions of the investments which belonged to her or to her estate as such executrix. After payment of debts and legacies there remained a surplus of 794*l.* 13*s.* 2*d.* Save as aforesaid, and to the further extent of a small sum of 3*l.* 10*s.* received as rent, and applied as set forth in his in his first answer, defendant denied that upon the death of the testator he entered into possession of the receipts and profits of the leasehold estate, or possessed himself of any of the personal estate not specifically bequeathed. The securities in which the surplus or residue was invested continued on foot, from time to time, at the request of the executrix. Defendant made to her, in respect of the moneys placed by her in his hands, the payments of principal and interest mentioned in the first paragraph, and in the schedule to his answer to the original bill, and after her death he made in respect of the same the payments set forth in the second paragraph and schedule to his former answer. When, subsequently, a sum of 600*l.* became payable on the said securities, upon an account between him and the executrix, or her estate as executrix, of the moneys placed in his hands, and the payments made by him as aforesaid, there was no balance in her favour, or a small balance in defendant's favour, whereupon, the defendant said, the security for

the said 600*l.* was renewed in his name as his property, and the security for the remaining 200*l.* was also treated by him as his property. The moneys so placed in his hands for investment amounted to 794*l.* 13*s.* 2*d.*, which amount, or thereabouts, acting as such solicitor as aforesaid, under the instructions of the said executrix, he put out, in the name of the said executrix, as follows: viz., 200*l.* on the promissory note of G. B. M. Lisle, Esq., and 600*l.* on the promissory note of Dr. Lisle, both at 5 per cent. Save as aforesaid, the defendant denied that he retained the same in his hands or power for any time, or that, assuming to act as if he were trustee of the will, he lent or advanced the same sum, or any part of such surplus or residue, to any persons or person, upon any securities or security, in his own name, or in the name or names of any person or persons, or in any manner. He alleged that from time to time he accounted for and paid to Ann Morgan, during her life, interest on so much of the residue as the aforesaid account showed to be the balance of principal in her favour. On the 15th of March, 1856, defendant renewed the security given by Dr. Lisle for the 600*l.*, by taking Dr. Lisle's bond for that sum in his (defendant's) own name; and save as aforesaid defendant was unable, from lapse of time and impaired memory, to state whether he called in any of the moneys invested by him as in the bill mentioned; but, save as aforesaid, he denied that he invested the amount, or any part thereof, in his own name upon any other securities or security. To the best of his belief the indenture of settlement referred to in the bill had never been acted upon. The settlement was never executed, but why not the defendant could not set forth.

Save as aforesaid, the defendant denied that he was in possession of the sum of 800*l.*, or of any part thereof, or of the securities in or upon which the same or any part thereof was invested; or that he shortly afterwards, or at any time, in part performance of the said alleged agree-

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ment, or as trustee of the said indenture, entered into possession or receipt of the rents and profits of the leasehold premises, or possessed himself of the goods and chattels intended to be assigned by the said indenture of settlement. The payments which he made to Ann Morgan were made on account of the principal and interest of the moneys which she placed in his hands as her solicitor. At the time of the executrix's death, on the defendant's account with her of the principal and interest of the moneys placed by her in defendant's hands as aforesaid, there was a balance in her favour of 183*l.* 19*s.* 11*d.*, in respect of which, or of so much thereof as thereafter from time to time continued due to her estate as such executrix, the defendant continued to receive the income as it became due. Save as aforesaid, he denied that he continued to receive the income of the testator's residuary estate as it became due. To the best of his belief, he did not (save that he renewed the security of Dr. Lisle for the 600*l.* as aforesaid) call in any part of the said sum of 800*l.*, or reinvest the same. The note for 200*l.* and the bond for 600*l.* had, since they became the defendant's property, been recently paid off, viz., the note on the 12th March, 1858, and the bond on the 27th November, 1857.

The Defendant knew, when the sum of 1141*l.* 15*s.* 8*d.* was placed in his hands, that it belonged to the testator's estate. Acting as solicitor, he was aware, when he proved the will in 1833, that the trusts did not give any power to invest on personal security; he also knew that the plaintiff was interested under the trusts of the will; and, save as aforesaid, he denied that he received the residuary estate with knowledge of the trusts, or knew or suspected, or had reason to know or suspect, that the investment of any part of the trust fund on personal securities was a breach of trust; "for that he acted therein only as the solicitor of the said executrix, under her instructions;

and he submitted that he was not called upon to take cognizance or notice of any (if any) breach of trust committed by her in respect of the plaintiff, or any *cestui que trust*." He claimed to be allowed, in taking the account, payments made from time to time to Ann Morgan (afterwards Phillip), on account both of principal and interest, to the amount in the whole of 939*l.* 12*s.* 6*d.*, and also his professional costs, charges, and expenses as solicitor.

Statement.

Mr. *Bacon*, Mr. *Speed*, and Mr. *Fischer* for the plaintiff, contended that it was admitted by the answer that, while there was no personal representative of the testator, the defendant had acted in the trust, and that he was, therefore, accountable, as trustee, for all moneys that passed through his hands, and were misapplied with his knowledge or permission. In *The Attorney-General* v. *The Corporation of Leicester* (*a*), it was held that an agent guilty of a breach of trust was personally liable: *Pannell* v. *Hurley* (*b*), and *Salomons* v. *Laing* (*c*), were also cited.

Argument.

Mr. *Malins*, and Mr. *E. N. Ayrton* for the defendant Stephens.—

The mere receipt of the money, and payment of it to the executrix, would not make the defendant liable for a breach of trust to which he was not privy: *Keane* v. *Robarts* (*d*). The defendant was the agent of the executrix, and was bound to pay the moneys to his principal: *Nickolson* v. *Knowles* (*e*). In the case of *Myler* v. *Fitzpatrick* (*f*), a mere agent of the trustee was held not accountable to the *cestui que trust*. In *Fyler* v. *Fyler* (*g*),

(*a*) 7 Beav. 176.
(*b*) 2 Coll. 241.
(*c*) 12 Beav. 377.
(*d*) 4 Madd. 332.
(*e*) 5 Madd. 47.
(*f*) 6 Madd. 360.
(*g*) 3 Beav. 550.

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which resembled the present case, the solicitor who allowed the trustee to make an unauthorized investment of the trust funds, but not fraudulently, or for his own benefit, was held not liable as a constructive trustee. In *Marshall* v. *Sladden*(*a*), it was laid down that the case in which a mere agent is liable was limited to cases of frauds as defined by a court of equity.

Judgment.

THE VICE-CHANCELLOR:—

The defendant urges that he received the moneys for which he is asked to account merely as agent.

If a trustee employs an agent, so long as the acts done by the person so employed are confined to mere agency on behalf of his employer the trustee, generally speaking the agent cannot be made accountable as trustee. But where the agent obtains possession of the trust funds, and his acts are not in strict conformity with his duty as agent, he ceases to be a mere agent.

The necessities of mankind require that the fullest protection should be afforded to the character of agent, and to that protection he is entitled, by the principles of this Court. But it would be highly dangerous to allow a solicitor to quit his proper character and to get into his hands the assets of a testator, either through the authority, negligence, or confidence of an executor, and then to protect himself from liability in respect of such moneys of which he knew the trusts, by treating such acts as done merely in the character of agent. The grossest frauds might be perpetrated if a solicitor were allowed to get a testator's assets into his own possession, and then to say that the money was paid to his principal by whom he had been employed, and to shelter himself under the character of a mere agent when he paid the money over with the full knowledge of all the trusts, and that a gross breach of trust was being committed.

(*a*) 7 Hare 428.

In the case of *Myler* v. *Fitzpatrick* (*a*), to which reference has been made, Sir John Leach, in overruling a demurrer, said that the agent had not only assumed the duty of trustee, but made a profit, and it was argued in this case that, because the solicitor did not make a profit, he was not liable as trustee. But the question of profits is entirely distinct from the question of liability for a breach of trust. When trust money gets into the hands of a person who, knowing the trusts, allows such money to be improperly dealt with, he is accountable.

In this case there is evidence of a gross breach of trust. The income of the property was payable to the executrix, and the capital of the fund, having got into the hands of the solicitor, was, through his intervention, spent by the executrix.

It has been contended that the assets of the executrix are alone liable, or, in other words, that the solicitor did not make himself trustee of the fund. But it is impossible to hold that the acts of the defendant were merely those of agent or solicitor.

There must be a declaration that the defendant Stephens is bound to account as trustee for such portions of the assets as came to his hands. There must be a decree against him in the usual form, with all just allowances, and reserving further consideration and costs.

(*a*) 6 Mad. 360.

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A director of an insurance company indebted for calls delivered a deposit note of the company, to the plaintiff for value and without notice. —*Held*, that the company were liable on the note, and could not set-off against the plaintiff the amount due from the director for calls.

THIS bill was filed against the company and the provisional assignee of one E. Lacey, for the purpose of obtaining a declaration that the plaintiff, by virtue of the deposit and memorandum of the 10th of August, 1857, as well as of the deed dated the 11th of December, 1858, became entitled to a good equitable charge for 171*l.* on the two several sums of 119*l.* 14*s.* 2*d.* and 114*l.* 14*s.* 2*d.*, due from the company mentioned in the deposit notes dated the 2nd of March and 18th of April, 1857. The bill also asked for an account and payment by the company of the moneys which should be found due on the plaintiff's claim, and that the residue might be paid to the defendant, Sturgis.

The bill stated that the company was formed in 1853, by a deed of settlement under the 7 & 8 Vic. c. 110, and was completely registered in the same year under the Act. By the deed of settlement the company was authorized to receive money, by way of deposit, at interest, and to grant deposit notes in the form given below.

The bill alleged that on the 22nd of March, 1856, Edward Lacey, of Marine Parade, Gravesend, lent and deposited with the company 119*l.* 14*s.* at the rate of 6*l.* per cent. and received a deposit note numbered 35, and bearing date on that day duly signed and issued by three of the directors of the company, and which was in the following form:—

"Anglo-Australian and Universal Family Life Assurance Company. Capital, 150,000.

"London Offices, 5, Cannon Street West, City.

"Deposit Certificate, No. 35.

"We, the undersigned directors, hereby certify that

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the sum of 119*l.* 14*s.* was this day deposited with this company, at 6 per cent. interest, for six months certain, by Edward Lacey, of Marine Parade, Gravesend, in the County of Kent, Esq., and we hereby undertake, on behalf of the said company, that the whole amount, or such part thereof as shall from time to time be demanded, shall be repaid to the said Edward Lacey, with interest at the rate aforesaid up to the date of such repayment, on the expiration of fourteen days' notice, in writing, to be given to the secretary for that purpose, such notice to expire at the termination of the said six months, or at any time thereafter. We also reserve to the company the right of returning to the said Edward Lacey the whole amount of his deposit, or any part thereof, with interest at 6 per cent. to the date of repayment, on the expiration of any notice to that effect, which shall be forwarded in writing by the secretary, provided only that no such notice shall expire prior to the termination of the said six months first named herein. Given under our hands this 22nd day of March, 1856.

"119*l.* 14*s.*

"GRIFFITH TAYLOR,
"J. W. WEBSTER,
"JOHN JAMES RIDGE,
} Directors.
"JOHN NEWTON, Secretary."

The bill alleged that on the 18th of April, 1857, Edward Lacey deposited with the company the further sum of 114*l.* 14*s.* 2*d.* at interest at 6 per cent., and thereupon a deposit note numbered 53, dated the 18th of April, 1857, was duly signed and issued by the said three directors in the same form as above, and expressed to be a security for repayment of the sum, with interest at the same rate.

The fourth and fifth paragraphs of the bill were as follows:—

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4. On the 10th day of August, 1857, the said Edward Lacey, being entitled to the said two sums of 119*l.* 14*s.* and 114*l.* 14*s.* 2*d.*, so deposited as aforesaid, applied to and requested the plaintiff to advance and lend him the sum of 171*l.* upon the security of the said two deposit notes and moneys thereby secured. Before the plaintiff agreed to make such advance, he called at the offices of the said company, in Cannon Street aforesaid, and saw Mr. John Newton, the secretary of the company, and showed him the said two deposit notes, and asked him whether the moneys mentioned therein were then in the hands of the said company, to which he replied "Yes; and it is all right." On the faith of the answer so given by the said secretary, the plaintiff consented to make the requested advance, and he accordingly, on the same day, paid the said sum of 171*l.* to the said Edward Lacey, who thereupon deposited the said two deposit notes with the plaintiff, and signed and gave to the plaintiff the following memorandum, videlicet:—

"Memorandum.

"I hereby deposit with Mr. James Woodhams, of No. 14, Hobury Street, Chelsea, two deposit notes for 114*l.* 14*s.* 2*d.* and 119*l.* 14*s.* in the Anglo-Australian and Universal Family Life Assurance Company, 5, Cannon Street west, City, numbered respectively 35 and 53, to secure the due payment of 171*l.* as follows:—100*l.* at six weeks, and 71*l.* at two months from the date hereof, and I undertake to legally assign the same to Mr. Woodhams upon demand, and to do any acts that may be necessary to enable him to receive the amounts of the respective deposit notes, for the purpose of repaying himself the said sum of 171*l.* Dated this 10th day of August, 1857.

"EDWARD LACEY."

5. On the 6th day of October, 1857, the plaintiff, by

his solicitor, gave the following notice in writing to the said company by leaving the same with one of their clerks at their said offices in Cannon Street:—

"To the Directors of the Anglo-Australian Universal Family Life Assurance Company.

"16, Gresham Street, London.

"6th of October, 1857.

"I hereby give you notice that two deposit certificates, numbered respectively 35 and 53, for the respective sums of 119*l.* 14*s.* and 114*l.* 14*s.* 2*d.*, under the hands of three of the directors of the Anglo-Australian Universal Family Life Assurance Company in favour of Edward Lacey, Esq., have been, by the said Edward Lacey, deposited for a valuable consideration with James Woodhams, Esq., of No. 14, Hobury Street, with an undertaking by the said Edward Lacey to assign all his interest therein to the said James Woodhams upon demand. Dated this 6th day of October, 1857.

"H. E. VOULES,
"16, Gresham Street, City,
"Attorney for the said James Woodhams."

By an indenture dated the 11th December, 1857, Edward Lacey formally assigned to the plaintiff the said two several sums deposited with the company, and all securities for the same, with a proviso for redemption on repayment of the sum of 171*l.* on or before the 20th February, 1858; which was not paid. On the 15th December, 1857, the plaintiff by his solicitor, informed the company, by its secretary, of this assignment, and on the 24th February, 1858, gave notice in writing to the secretary, demanding repayment of the sums mentioned in the deposit notes with interest, at the expiration of fourteen days. The company refused to pay, alleging that they had a set-off to a greater amount. Whereupon

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Mr. Voules, the plaintiff's solicitor, wrote to the secretary, demanding the particulars, in reply to which the secretary referred Mr. Voules to the company's solicitor, who returned the following answer:—

"To H. E. Voules, Esq., Solicitor, 16, Gresham Street,

"16, Furnival's Inn, April 19th, 1858.

"Anglo-Life and Woodhams,

"Dear Sir,—One of the answers to your clients will no doubt be a set-off to a larger amount than deposited by Edward Lacey. This set-off consists of a large sum due for calls upon the company's shares; further than this, of course, I do not feel justified in saying.

"Yours very truly,

"H. HAMMOND,

"*Pro* WM. HAMMOND."

The bill charged that the defendants ought to discover and set forth the particulars of the set-off, the items, and by what instruments the same were created.

Subsequently to the filing of the bill, Edward Lacey presented his petition in the Insolvent Debtors' Court, and Samuel Sturgis was appointed provisional assignee, and made a defendant to the bill by amendment.

The defendants, by their answer, set forth the provisions of the company's deed, specifying the business to be transacted:—

"That the business or purpose of the Company shall be as follows, viz:—To grant assurances on lives, or on any contingencies relating to or depending upon lives, To grant annuities, either for lives or for terms of years, and either immediate, deferred, or contingent, as to the enjoyment, and either certain, contingent, or varying as to the amount thereof. To grant endowments, assurances and annuities. To buy and sell reversionary property and life interests. To grant loan and guarantee

assurances of all denominations. To grant assurances against personal injury or loss of property arising from shipwrecks, railway accidents, or other casualty, and also against diseases, mental or bodily, and generally to transact all or any such business as is, or for the time being shall be, usually transacted by life assurances, annuity, reversionary interest, endowment, loan or guarantee companies." And moreover, by the 17th clause of the said deed of settlement, it is provided as follows:— "That in case it shall be resolved at any extraordinary meeting, by a majority consisting of at least two-thirds in value of the shareholders present (either personal or by proxy); also of two-thirds in value of such policy-holders as aforesaid, personally present, to make any bye-laws or regulations for the better management and government of the company; to add to, repeal, alter, or vary any of the clauses therein contained, or any of the existing rules, regulations, or bye-laws of the company for the time being; to make and enter into and carry out, any contract for the undertaking or performing all or any part of the assurances and engagements of other assurance companies, whether incorporated or not; to increase (within the limits aforesaid), the capital of the company; to borrow money on behalf of the company; to apply for an Act of Parliament or charter, for any purpose whatsoever, relating to or concerning with the affairs of the Company; to remove from office any director, auditor, or trustee, or to dissolve or re-arrange the Company; every or any such resolution shall be binding and conclusive upon the Company, provided the same shall have been previously recommended for adoption by the directors, and provided also that the same be confirmed by a subsequent extraordinary meeting; and by clause 120 it was provided as follows:— "That in case it shall be resolved in manner provided by the 17th clause hereinbefore contained, to borrow any

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money on behalf of the Company, the same shall be raised either upon the security of a mortgage of the whole or any part of the property of the Company, or of a bond or bonds, under the common seal of the Company, but the total amount to be borrowed shall not at any one time exceed one-half of the subscribed capital for the time being of the Company; and by clause 121, it was provided as follows:—"That it shall be lawful for the directors from time to time, on behalf of the Company, and for the purpose and in the ordinary course of the business thereof, to make, draw, indorse, accept, and negotiate such bills of exchange and promissory notes as they shall think fit, provided always, that the aggregate for which the said Company shall at any one time become or continue liable in respect of such bills of exchange and promissory notes, shall not exceed one moiety of the subscribed capital for the time being. "And by clause 122 it is provided as follows, that no money whatever shall be raised or borrowed by or on behalf of the Company, otherwise than in the manner and to the extent hereinbefore provided for.

Mr. Lacey was one of the provisional directors of the company before its formation; he was also one of its original directors and deputy-chairman. He continued to be one of the directors until about November, 1857.

The defendants by their answer alleged, on or about the 27th of February, 1855, an extraordinary general meeting of this company was held, and the business transacted at such meeting consisting of the particulars stated in the following extracts from the minute-book of this company (mainly):—"At an ordinary meeting of shareholders and policyholders of the above company, held at their London office, No. 5, Cannon Street, West, City, on Tuesday, the 27th day of February, 1855. John James Ridge, Esq., M.D., chairman of the court of directors, in the chair. The meeting having accord-

ingly resolved itself into an extraordinary general meeting. It was moved by Dr. Ridge, seconded by G. E. Lacey, Esq., and carried unanimously:—That, pursuant to the powers of the 17th, 120th, 121st, and 122nd clauses of the deed of settlement of the company, the directors of the company be and they are hereby authorized to receive deposits of money at interest for the benefit of the company, and to take upon the security of the property of the company, or upon bond in accordance with the provisions of the deed of settlement, and at such rate of interest as the directors shall approve, any sum or sums of money not exceeding half the subscribed capital of the company, for the purpose of more effectually developing the loan department of the company. A vote of thanks to all the shareholders and policy-holders who had attended the meeting was moved by Mr. Pepper, and carried unanimously.

(Signed) "JOHN JAMES RIDGE,
"Chairman."

The company submitted that the above resolution, so far as related to the authority thereby professed to be given to the directors for receiving deposits of money at interest, was not within the powers of the general meeting, and could not bind the company; and that Mr. Lacey, the seconder of such resolution, was affected with notice of the invalidity.

That at a meeting of the court of directors, held on the 8th of November, 1853, Mr. Lacey, who was then deputy-chairman, and the other directors then present, passed a resolution to the effect following:—

"Remuneration of provisional directors:—It having been decided that the sum of 1000*l.* should be divided as originally proposed amongst the provisional directors, according to their respective attendances, it was resolved that, amongst others, Edward Lacey, Esq., on making payment of the first call of 1*l.* per share, on the 300

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shares he now wishes to take up, shall receive a draft for 195*l.*, as his proportion of the above-named sum."

In pursuance of such resolution, Mr. Lacey and the other directors mentioned in the resolution took out of the funds and divided among themselves the sum of 1000*l.* The sum which Mr. Lacey took out of the company's funds and appropriated to his own use was 195*l.*

That on or about the 11th of November, 1853, the said John James Ridge, the defendant, Edward Lacey, and the said Harry Horn respectively signed a memorandum of agreement in the words following (mainly):—

"Anglo-Australian and Universal Family
"Life Assurance Company,
"5, Cannon Street, West, City, London,
"November, 1853.

"We, the undersigned, late provisional directors of the Anglo-Australian Universal Family Life Assurance Company, agree with each other that, in the event of the sum of 1000*l.* each, which has been appropriated to us for the remuneration of our services as such directors, not being sanctioned at a general meeting of the above company, we will make a return *pro ratâ* of the same respectively secured by us. Witness our hand this 11th day of November, 1853."

At an extraordinary general meeting, held on the 31st of March, 1858, it was resolved, in conformity with the report of a special committee appointed to investigate the affairs of the company, that the sums appropriated were an exorbitant and unjustifiable charge upon the funds of the company, and ought to be refunded by the directors who received them. The company alleged that Mr. Lacey never had returned the said 195*l.*, and the same had therefore been debited to his account with the company, with interest. That at a general meeting of the shareholders and policy-holders on the 28th of February, 1856, the sum of 500 guineas was voted to the directors, of which the pro-

portion belonging to Mr. Lacey as director was 119*l.* 14*s.* It was agreed among the directors that a deposit note should be given for this amount, and accordingly the note or certificate No. 35, and dated the 22nd of March, 1856, in the bill mentioned, was issued and given to Mr. Lacey.

At a general meeting of shareholders and policy-holders, held on the 27th of February, 1857, a further sum of 500 guineas was voted to the directors as a remuneration for their services. Mr. Lacey's share as director amounted to 114*l.* 14*s.* 2*d.*, and accordingly the second deposit note or certificate in the bill mentioned was issued and given to Mr. Lacey for this amount and interest. The company alleged that it was agreed that the sums of money expressed in the two notes were not to be paid except by the consent of all the directors. They further alleged that the three directors who signed the notes had no power to bind the company, and that the instruments were invalid as respected the company.

On the 23rd of November, 1853, Mr. Lacey took an allotment of 500 shares in the company. He paid the call of 1*l.* per share on 300 shares only. The company had debited the calls on the remaining shares to his account. The company alleged that on Mr. Lacey being debited with this 200*l.*, and with the 195*l.* and interest, there was a balance due from him to them.

The company alleged that, to the best of their belief, the plaintiff, on the 10th of August, 1857, called at the company's office in Cannon Street, and asked Mr. Newton, the company's secretary, "Did Mr. Lacey deposit these sums with the company?" or "Has Mr. Lacey deposited these sums with the company?" or to that effect; and that Mr. Newton did not then and there state or represent that there was a balance on Lacey's account sufficient to cover the moneys mentioned in the notes, or any part thereof, and that Mr. Newton did not give an answer in reply to any such an inquiry, as alleged by the bill.

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The defendants admitted that notice of the deposit with the plaintiff by Mr. Lacey of the two certificates was given to them by the plaintiff on the 6th of October, 1857; and they stated that on the 14th of October, Mr. Lacey wrote to one of the directors to the effect that he had received a note from the secretary informing him of the delivery of such notice; that he had deposited the two deposit notes with the plaintiff as a collateral security for a sum which he (Mr. Lacey) had borrowed from him; and complaining of the want of courtesy of the plaintiff in not mentioning to him (Lacey) that he (the plaintiff) was about to give notice to the company.

On the 4th of December, 1857, another call of 1*l.* per share was made. The company alleged that at this date Mr. Lacey was the proprietor of the 500 shares. He had not paid this call in respect of any of the shares, and the 500*l.* had been debited in his account.

The company by their answer submitted that, even if the plaintiff had been entitled when he first received the notes to be paid the sums mentioned therein, by allowing the money to remain with the company, it became subject to the calls made on the shares held by Lacey.

In cross-examination, the plaintiff admitted that his original debt had been reduced to 85*l.* 10*s.* by his receiving a composition from Mr. Lacey of 10*s.* in the pound. On being asked whether before he received the 10*s.* composition he had had any conversation with Mr. Lacey as to the deposit notes, he said that he had asked Mr. Lacey's solicitor whether receiving the composition would affect his claim on the deposit notes, and that gentleman replied, "Certainly not."

Argument.

Mr. *Bacon* and Mr. *Shebbeare*, for the plaintiff, contended that the plaintiff was entitled to demand payment of his claim. He had done all necessary to perfect his

title by giving immediate notice of the assignment to the company.

[*Rolt* v. *Hopkinson*(*a*) was cited.]

Argument.

Mr. *Malins* and Mr. *Roxburgh*, for the defendants.—This was not a negotiable instrument, but a chose in action, and the plaintiff was in no better situation than Lacey. The company was clearly entitled to set off against Lacey's claim the amount due from him on his shares.

But the case went further. This note was obtained by fraud, and the plaintiff must take it, subject to all the equities that would have attached to it in the hands of Lacey. At the date of the notes there was no sum whatever due from the company to Lacey; and if the plaintiff had sued, which he could only do in the name of Lacey, he could have therefore recovered nothing. The assignee of a bond can be in no better situation than the obligee who assigns it, but is subject to the same equities: *Cator* v. *Burke*(*b*).

Again, this transaction was not within the powers given by the 7 & 8 Vic. c. 110, or the deed of settlement, and was therefore void: *Ernest* v. *Nichols*(*c*); and the assignee of an instrument so created was affected by the original defect in the transaction: *The Official Manager of the Athenæum* v. *Pooley* (*d*).

Judgment.

THE VICE-CHANCELLOR:—

This is not a case of the assignment of a chose in action. This is a demand against the company upon a deposit note which has been assigned to nobody, but which passed by delivery to the present plaintiff, who has a valid title. I certainly was very

(*a*) Ho. Lds. Cas. not yet reported.

(*b*) 1 B. C. C. 434.

(*c*) 6 Ho. Lds. Cas. 401, 419.

(*d*) *Antè*, vol. i. 102; s. c. 3 De G. & J. 294.

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much surprised to hear, in a case of this kind, the arguments which have been addressed to the Court on the question of the supposed equities that have arisen upon the assignment of a chose in action. A deposit note for money, like a deposit note for goods, passes by delivery of the instrument, and requires no assignment. The plaintiff has proved that he has received this note by a delivery which is unquestionably valid. It is a note which acknowledges that this company have had deposited with them moneys to a certain amount. Notice of the right of the plaintiff, who was in possession of the note, was given on the 10th of August, 1857. The fact of the deposit of the money was then acknowledged, and there were subsequent transactions between the company and the original depositor. From the time when the company had notice that the right was transferred to the plaintiff he had nothing to do with the subsequent transaction between the company and the person who delivered the note to him. I can hardly imagine a more disgraceful, or dishonest, defence than that set up by the company. While they have possession of the moneys, they try to make out that it was an illegal transaction under the statute of the 7 & 8 Vic. c. 110; and when that fails, they try to set-off a claim against the original depositor, which was never mentioned to the plaintiff at all. The case is one in which the plaintiff has acted fairly. He has proved a debt against the company, and given the company the benefit of the sum which he received from the estate of Lacey. The plaintiff is entitled to a decree against the company, with costs.

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DOUGLAS *v.* CULVERWELL.

Nov. 4th 5th & 6th & Dec. 4th.

A deed purporting to be an absolute sale executed by the plaintiff, when in great pecuniary difficulties, for an inadequate consideration, declared to be only a mortgage for the amount of the purchase-money, it appearing that the plaintiff's object, within the knowledge of the defendant, was to obtain a loan, and not to sell; that one solicitor alone acted for both parties, and that the defendant (the purchaser) had been suddenly introduced instead of an intended lender on the day the transaction was completed.

The defendant was ordered to pay the costs of the suit but the plaintiff, having disputed the authenticity of the documents which were proved in the cause, the Court disallowed him the costs occasioned by the imputation that the documents were forged.

THIS bill was filed by W. H. A. Douglas, and it prayed, that a transaction purporting to be a sale of Heathbourne Cottage, near Bushy, Herts, might be declared to be a mortgage only for the moneys paid by the defendant, and that the deed executed on the occasion of such transaction, and purporting to be an absolute conveyance, might be rectified. The bill also prayed for an account, and on repayment of what should be found due on the footing of a mortgage, that the defendant might be decreed to recover the premises, and to deliver up the deeds.

The bill stated, that the plaintiff became entitled to the premises, in fee simple on the death of his father, subject to a lease dated in 1839, to a Mr. Lovekin, at the rent of 18*l.* per annum.

The bill alleged, that in month of March, 1842, the plaintiff, being about to establish himself in business in the medical profession, obtained, through a Mr. S. M. Cooper, his solicitor, a loan of a sum of 150*l.* from a Mr. J. P. Fowler, a client of Mr. Cooper. That on the 23rd of March, 1842, Mr. Fowler paid the plaintiff 149*l.* (less about 13*l.*, which were deducted by Mr. Cooper for costs), and the plaintiff executed to Mr. Powler a mortgage of the property for 150*l.*, with interest at 5 per cent. The title-deeds, which related to property of greater value, remained in the possession of the plaintiff's family.

The bill then alleged as follows:—About the end of July 1842, the plaintiff was in want of a further sum of 100*l.*, and Mr. Cooper undertook to obtain him such further sum as a loan on the security of a further

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mortgage of the house and premises. On the 4th August, 1842, he called at Mr. Cooper's office, 9, Old Cavendish Street, when Mr. Cooper made an excuse for the absence of Fowler, who, he said, was ill, and then and there introduced the defendant, Richard Culverwell, to the plaintiff, whom the plaintiff then met for the first time, and who, Mr. Cooper said, was willing to advance the money. A deed was then produced for the plaintiff to execute, and he was about to do so, when it occurred to him that it was not in the same form as the former mortgage, and he told Mr. Cooper so; whereupon, Mr. Cooper said it was not a regular mortgage, but it was worded so that the defendant should receive the whole of the rents by way of interest, for that the law allowed interest at 5 per cent. only, while the defendant required a higher rate for his money, but that the plaintiff might look upon it otherwise as a mortgage. The defendant, who was present, joined in this assurance, and told the plaintiff he might redeem the property at any time he thought proper, on repaying to the defendant the amount he was then about to receive, he, the defendant, in the meantime receiving the rent, keeping down the insurance on Fowler's mortgage, paying for the insurance on the property, and retaining the surplus to his own use in lieu of interest. The bill alleged that after reiterated assurances to this effect from both the defendant and Cooper, the plaintiff, calling all who were present to witness that he signed the deed as a mortgage, and not as a sale, executed the deed, and thereupon the defendant handed to Cooper, on behalf of the plaintiff, the sum of 101*l.*, out of which Cooper retained 15*l.* for the costs of the deed, to which the plaintiff assented. The sum was delivered by the defendant to Cooper in the shape of a bank-note for 100*l.* and a sovereign. The other persons present at the execution were two clerks of Mr. Cooper, named Moore and Cozens, and a Mr. Bur-

ridge, who, Mr. Cooper said, was his medical attendant. After the plaintiff had executed the deed, Mr. Cooper, in the presence of the defendant, handed to the plaintiff a paper bearing the defendant's address, saying, "That is where you are to go when you return the 101*l.*;" and the plaintiff, at the request of the defendant, wrote and handed to the defendant a note addressed to Mr. Lovekin, requesting him to pay the rent to the defendant for the present, until he heard from the plaintiff to the contrary. On the 22nd of October, in the same year, application was made to the defendant personally by a sister of the plaintiff on his behalf, and an offer was then made by her, on the plaintiff's behalf, to redeem the property on payment of the 101*l.* The defendant did not then deny the undertaking and agreement as aforesaid, but taunted the plaintiff's sister with having no writing to show in support of it, and refused to allow the property to be so redeemed. The defendant had been in possession and receipt of the rents ever since the date of the deed. He had some time since paid off Mr. Fowler, and taken a transfer of his mortgage. Shortly after October, 1842, the plaintiff fell into embarrassed circumstances, and not till now had he been in a position to redeem or sue for the redemption of his property. The plaintiff had recently applied to the defendant to come to an account, and to reconvey, on payment of what should be found due to him; but the defendant wholly refused, and claimed to hold the property as absolute owner.

The plaintiff alleged the value of the property in 1842 was between 700*l.* and 800*l.*

The bill then prayed that the transaction might be declared to be a mortgage.

The defendant, by his answer, produced a copy of a memorandum of agreement, dated the 11th of March, 1839, between Joseph Douglas, the plaintiff's father, and Mr. Lovekin, whereby Joseph Douglas agreed to grant

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a lease of Heathbourne Cottage for twenty-one years, at a rent of 18*l.*, on Mr. Lovekin erecting a bedroom and kitchen, and repairing the whole house, Joseph Douglas agreeing to insure the house as at present. The copy of this memorandum had only come into his possession within the previous few days. The answer alleged that the selling value of the house in August, 1842 (subject to the lease), was 300*l.*, which was the sum the plaintiff himself set upon it. That the defendant had recently spent about 100*l.* on the house in repairs and improvements, at the instance of the present tenant. The value of the property near Bushey had very considerably increased in value of late years. On or about the 4th of August, 1842, Mr. Cooper informed defendant that the plaintiff was in need of money, and (as the defendant believed in the presence of the plaintiff) that the plaintiff intended to sell the premises absolutely. On the 4th of August, 1842, Mr. Cooper came to the defendant's shop in Great Marylebone Street, and, so far as he recollected, accompanied by the plaintiff. Mr. Cooper stated that the plaintiff wished to sell some property at Bushey upon which Mr. Fowler had advanced 150*l.* on mortgage, and asked the defendant to purchase it. That the defendant immediately said he knew nothing of the property. In answer to this remark, Cooper said that Mr. Fowler would buy it, but he was not in London, and the plaintiff wanted 150*l.* for it. Mr. Cooper explained that the property was let for 18*l.* a year on lease, and that there were seventeen or eighteen years to run. That the defendant declined to have anything to do with the matter unless he saw the property, and offered to go down with Mr. Cooper and see it. He said if he liked it, and considered it worth the money, he would buy it. Mr. Cooper then said that the money was wanted immediately, and therefore that course could not be taken. Mr. Cooper still pressing defendant to purchase the property, the defendant

offered 100*l.* for it, which offer was refused, and Mr. Cooper then went away. In the course of about two or three hours afterwards he returned, and asked defendant to give more than 100*l.* for the property, but the defendant peremptorily declined to do so. At length he consented to give 101*l.* for it. Mr. Cooper then made an appointment to complete the purchase at his office that evening, but the defendant immediately said, "You can't be prepared so soon." Upon which Mr. Cooper said he had prepared the draft, and, to the best of the defendant's recollection, assigned as a reason for having done so, that he supposed Mr. Fowler would purchase the property, and he had only to substitute defendant's name. That the defendant produced a memorandum of agreement, which purported to be an agreement whereby W. H. A. Douglas agreed to sell, and R. Culverwell agreed to buy, for the sum of 101*l.*, the equity of redemption in the fee-simple of the house and premises, and the said W. H. A. Douglas thereby agreed to make a good title and execute a conveyance with the usual covenants, and to give authority to the tenant to pay the rent to Richard Culverwell, his heirs and assigns. It was agreed that 101*l.* should be paid on the execution of the conveyance, the expenses of the conveyance and investigating the title to be borne by the said W. H. A. Douglas. This memorandum was of the same date, and purported to be signed by the plaintiff and witnessed by Cooper. Defendant attended at the office of the defendant in the evening, where he found Cooper, the plaintiff, Mr. Burridge, and Mr. Cozens, a clerk in the employ of Cooper. A deed was laid before them, and read over and executed by the plaintiff and defendant, and attested by Mr. Cooper, Mr. Burridge, and Mr. Cozens. When the defendant was about to pay the purchase-money, he asked the plaintiff to write a letter to the tenant, instructing him to pay the rent to the defendant for the future. That

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plaintiff objected to the proposition, stating as his reason that he did not wish his family to know that he had sold the property; but, upon defendant's saying that he would not pay the purchase-money without having such a letter, plaintiff ultimately wrote to Mr. Lovekin a letter, stating that he (plaintiff) had sold the cottage, and authorizing and directing him to pay the rent henceforth to R. Culverwell, of 53, Great Marylebone Street, tailor, and that his receipt would be a sufficient discharge. That the defendant denied the allegations in the plaintiff's bill so far as they were inconsistent with these statements. After the execution of the said deed, the defendant handed to Mr. Cooper, on behalf of the plaintiff, the sum of 101*l.*, and he believed Cooper did pay himself 15*l.* out of that sum. That the defendant further alleged that one day in October, 1842, on his return to his home, he found a lady and gentleman waiting for him. The lady introduced herself as the sister of the plaintiff, and asked defendant to take back the money, defendant had, as she said, lent to the plaintiff on the property; but defendant told her plainly that he had not lent the plaintiff any money, but had purchased the property, and therefore refused to accede to her request. That defendant offered to sell her the property, and said he would take 50*l.* more than he gave for it. She pressed defendant to take 25*l.* more, but he declined. Shortly afterwards defendant received a letter from the plaintiff, dated the 26th of October, 1842, asking him to accept his sister's offer of 25*l.* and the sum defendant had paid; but defendant declined that offer, and another to the same effect in the November following. In August, 1858, the plaintiff wrote a letter to Mr. Lovell, defendant's solicitor, requiring defendant to permit him to redeem the property; and Mr. Lovell wrote on behalf of the defendant refusing to do so, and declining any further correspondence on the subject. In November, 1859, Mr. Braund, plaintiff's

present solicitor, wrote to defendant expressing a wish to effect an amicable settlement relative to the Bushey property. Defendant replied that he had purchased the house, and offered to produce, and did produce, to Mr. Braund the deeds and papers respecting the matter in his possession. Extracts from Mr. Cozens's diary, and from Mr. Cooper's bill of costs were produced, containing entries relative to the "purchase" by Mr. Culverwell of the Bushey property. That the defendant denied that any agreement or undertaking for making the conveyance subject to redemption by the plaintiff was ever entered into, and said that, if there had been any such agreement, it ought to have been in writing under the Statute of Frauds.

The plaintiff by his affidavit verified the allegations of the bill, and with respect to the notice to Mr. Lovekin said that he wrote and signed a notice in the following terms:—

"Dear sir,—Please to pay the rent for the present until you hear from me to the contrary, to the bearer, Mr. Culverwell.

"Yours faithfully,

"W. H. A. DOUGLAS."

Plaintiff said he was certain he never wrote or signed any such letter as was set forth in the answer as having been written to Mr. Lovekin. He denied that he ever authorised Mr. Cooper to negotiate a sale of Heathbourne Cottage, or that he ever had any intention of selling it, or that he ever signed, or authorised any one to sign on his behalf, any such memorandum as was set out in the answer, or that he ever heard of such a document until his solicitor, Mr. Braund, told him that the defendant had produced what purported to be such a document. He denied further that the deed was read over to him, or that he stated as an objection to writing a letter to the

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tenant of the property that he did not wish his family to know he had sold it. Mr. Lovekin and Mr. Fowler were both dead; and Mr. Cooper, the solicitor, plaintiff believed was living; but his name was not in the Law List, and plaintiff did not know where he was to be found.

The plaintiff's sister deposed that previously to the lease to Mr. Lovekin, her father had repeatedly offers of 800*l.* and 900*l.* for the property.

Mr. Cozens deposed to the deed and other documents mentioned in the answer having been signed by the plaintiff.

There was a great deal of evidence, the effect of which was considered in his Honour's judgment.

Argument.

Mr. *Greene* and Mr. *Dauney* for the plaintiff.—

There was, no doubt, a conflict in the evidence, but the probabilities of the case were in favour of the plaintiff's statement. But further, the testimony of one witness was supported by the collateral circumstances, and must, therefore, prevail against the positive oath of the defendant: *Morphett* v. *Jones* (*a*), *Pember* v. *Mathers* (*b*).

It was clear that the Statute of Frauds did not exclude parol evidence to show the real nature of the transaction: *Lincoln* v. *Wright* (*c*).

If the transaction were a mortgage, it was quite clear the defendant could not be allowed for unreasonable improvements.

[*Sandon* v. *Hooper* (*d*), *Gibson* v. *Russell* (*e*) were cited.]

Mr. *Malins* and Mr. *C. Browne* for the defendant.—

(*a*) 1 Swanst. 182 (bottom of page).
(*b*) 1 B. C. C. 52—54.
(*c*) 4 De G. & J. 16.
(*d*) 6 Beav. 246.
(*e*) 2 Y. & C. C. 104.

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The defendant was a purchaser for valuable consideration, and his title could not be impeached. Admitting the principle laid down in *Pembee* v. *Mathers* (*a*); in this case the collateral circumstances were in favour of the defendant's statement, because the deed was clearly an absolute conveyance. Moreover, in that case Lord Thurlow directed the disputed fact to be ascertained at law. The whole of the evidence negatived the motion that the transaction was a mortgage.

Assuming, then, it was a sale, there was nothing to affect the defendant's title. He was a stranger to the plaintiff. There was no confidential relation subsisting between the parties, and he bought the property at the urgent request of the plaintiff and his solicitor.

[*Jones* v. *Sherriffe* (*b*), *Lord Midleton* v. *Eliot* (*c*) were cited.]

Mr. *Greene* replied.

His Honour reserved judgment, which he delivered on the 22nd of December, 1861.

Judgment.

THE VICE-CHANCELLOR:—

The question in this cause is, whether the defendant is entitled to retain the house and land conveyed to him by the plaintiff as an absolute purchase, or whether, on the evidence as to the real nature of the transaction, the Court ought to set it aside as an absolute sale, and direct a reconveyance to the plaintiff on terms.

It appears, from the evidence, that the money paid by the defendant was very considerably less than the fair value of the property. But on the mere ground of undervalue there is certainly no sufficient ground for

(*a*) 1 B. C. C. C. 52.

(*b*) Cited in *Hoster* v. *Read*, 9 Mad. 38; also in Sugden V. & P., vol. 1, p. 188, 11th ed.

(*c*) 15 Sim. 531.

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setting aside the transaction. Although mere inadequacy of price may not be enough to justify the interference of the Court, yet if there be inadequacy of price to a considerable extent, with other circumstances, such as extreme pressure, or surprise, or unfairness, the Court has seldom refused relief.

In the present case it appears clearly enough that the defendant knew that the plaintiff's object was to borrow, and not to sell; that the defendant was an entire stranger to him, and only suddenly introduced on the day of the transaction; that the defendant employed no other attorney in the business except Cooper, who was the plaintiff's solicitor, and had been the solicitor of the defendant himself in other matters; that the defendant was, by the act of Cooper, suddenly brought forward only on the very day of the transaction instead of Fowler, who was to have advanced the money on mortgage; that the whole business was completed on the very day on which the defendant's name was first mentioned to the plaintiff; that at the time of the execution of the conveyance to the defendant there was an expression of surprise by the plaintiff that the deed was not in the form of a mortgage, and that he objected to execute it as an absolute conveyance.

The defendant, in his evidence, admits that the plaintiff objected to write a letter to the tenant of the property, stating that he had sold it to the defendant, and that, therefore, the defendant said he should not have any money unless he did so. The plaintiff has positively sworn that he executed the deed on the faith of a representation by the defendant, and also by Cooper, that, although it was in form an absolute conveyance, it should be looked upon as a mortgage, and that on repayment of the money and interest the defendant would reconvey. There are, however, material inaccuracies in the plaintiff's statements upon oath on other points which greatly

diminish the weight of his testimony. But the evidence of Potter as to the conduct and declarations of the defendant in October, 1842, less than three months after the transaction, is of very great weight. The evidence of this witness, taken with that of Miss Douglas and of Henderson, as to the negociations in the end of 1842, go to show very clearly that what the defendant then relied upon was that he had not in any manner bound himself in writing to reconvey, and the whole negociation turned upon the terms on which he would consent to reconvey to the plaintiff. Cooper's conduct towards the plaintiff, and the defendant's conduct in employing no other professional person in the transaction than Cooper, are very material circumstances, where the other parts of the evidence show that the plaintiff was completely in Cooper's power, and that Cooper betrayed the plaintiff's interest, and made himself the tool of the defendant to obtain the execution of an absolute conveyance. The multiplication of documents prepared for the plaintiff's signature by Cooper, all on the same day, into which words are slipped to describe the transaction as a sale, all tend to show that Cooper, as the tool of the defendant, was concocting a scheme for a sale to the defendant. These documents themselves were superfluous and useless for any other purpose than to give the transaction the colour of an absolute sale. Although the plaintiff has unfortunately denied the authenticity of these documents, and endeavoured to make out a case of forgery, there seems no reason to doubt that they were really signed by the plaintiff. The hurried nature of the transaction, and the urgent pressure of the plaintiff's necessities at the time may have effaced his recollection as to these papers. But his case is much prejudiced by his denial of their authenticity. It is not an unimportant fact that the plaintiff was charged with the whole expenses of the conveyance, which, if the transaction was a purchase,

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could not be considered usual or proper. Upon the whole case there seems enough upon the evidence to show that, considered as an absolute sale, it was a grinding and oppressive transaction, suddenly entered into through the contrivance of the plaintiff's solicitor, who was betraying his interests to serve the defendant, and who procured the plaintiff to execute an absolute conveyance at an undervalue. Unfair advantage taken of the necessities and distress of one who wishes and intends only to be a borrower, but is induced to execute an absolute conveyance in consideration of a sum of money greatly below the market value of the property, has been held enough to set aside the transaction as an absolute sale. The decisions of the House of Lords in *Gould* v. *Okeden* (*a*) and *Kendrick* v. *Hudson* (*b*), and the principles stated by Lord Thurlow in *Heathcote* v. *Paignon* (*c*) sanction this view. And where, as in this case, one of the circumstances of unfairness is the employment by the alleged purchaser of no other solicitor in the transaction than that of the distressed person who is betrayed by that solicitor into the execution of a deed of absolute sale instead of a mortgage, the right to relief is much stronger. This transaction, therefore, must be set aside. The defendant must be decreed to pay the plaintiff's costs of the suit, except so much of the costs as have been occasioned by the plaintiff's denial of the authenticity of the three documents—that is to say, the memorandum of agreement signed by the plaintiff dated the 4th of August, 1842; the letter of the plaintiff to Lovekin, the tenant of the property, dated the 4th of August, 1842; and the letter dated the 4th of August, 1842, signed by the plaintiff, and addressed to Cooper, as to the application of the money. In other respects the decree must be according to the form of the decree of

(*a*) 4 B. P. C. 198. (*b*) Ibid. 222. (*c*) 2 B. C. C. 167.

the House of Lords in the case of *Gould* v. *Okeden* as stated in 4 Bro. P. C. 202 (*a*).

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Nov. 6th & 7th

A testator, who had advanced moneys to his son, and paid large sums on his account, bequeathed to him a legacy without making mention of the debt.—

Held, that the loan and unascertained balance must be set off against the legacy.

Upon the same principle the Court held that the assignees of a firm indebted to the testator were not entitled to receive a legacy bequeathed by the testator to a member of the firm. *Cherry* v. *Boultbee* (*b*) considered.

But a legacy to the *cestui que trust* of a settlement, by which the testator had covenanted with trustees to settle certain funds—*Held*, not a satisfaction of the covenant.

A direction by the testator to his executors to pay all his just debts, is, on the true construction of the statute 17 & 18 Vic. c. 113, sufficient to entitle his executor, who was also the devisee to an estate in mortgage, to exoneration.

MR. VERE HERBERT SMITH by his will, dated the 12th of February, 1859, made the following dispositions:—

"I give and devise that my mansion house called the Great Hill, with the stables, outbuildings, gardens, shrubberies, pleasure grounds, and the several pieces or

(*a*) The decree in *Gould* v. *Okeden* was as follows: "That the deeds of lease and release of the 17th and 18th of July, 1716, should be set aside from being an absolute purchase, and be considered only as a mortgage or security for the money really and *bonâ fide* paid by William Okeden to William Glisson, or to his order, or for his use; and that it should be referred to a master to take an account of what was due for principal and interest of the money so paid and advanced by the said William Okeden; and an account of the rents and profits of the lands and premises comprised in the said deeds received by the respondents since Okeden's death, or which might have been received without their wilful default, for or through the means of William Okeden, in his lifetime, with rests; and if, on taking the said account, the respondents (Okeden) should be found to be overpaid, then they should pay the surplus to the defendants, and deliver up to them the title-deeds, and reconvey the estate as in the decree mentioned; but if there should be anything found due to the respondents (Okeden), then, on the applicant's payment to them of what should be so found due, the respondents were to reconvey, &c.

(*b*) 4 M. & C. 442.

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parcels of land thereto belonging, the whole now being in my own occupation. And also all those several pieces or parcels of meadow or pasture land adjoining thereto, and now held by W. L. Butcher, W. M. Horsebreaker, and W. Warr, publican, as tenants thereof, and also my farm and lands called Llwyndu farm, now held by T. Collier as tenant thereof, all which said hereditaments and premises are situated in the said parish of Abergavenny. And also all that piece or parcel of garden ground adjoining the cemetery in the said parish. And also all that messuage or dwelling-house, shop, and outbuildings situate in High Street, in the town of Abergavenny, now in the occupation of Levi Lowndes as tenant, together with the fixtures and articles of furniture demised therewith. And also my seats or pews in the parish church of St. Mary at Abergavenny aforesaid, unto my daughter, E. Smith, her heirs and assigns for ever. I give and bequeath all my furniture, plate, and plated articles, books, wines, spirits, linen, china, carriages, horses, harness, and farming stock, and all other articles and things in and about my said mansion house and premises unto my said daughter Elizabeth, for her own absolute use and benefit. I give and bequeath the sum of 2000*l.* sterling unto my grandson V. H. Smith, of Wolverhampton, gentleman, and the like sum of 2000*l.* sterling unto my granddaughter, E. S. Jeavons, and to my executor hereinafter named the sum of 100*l.* each. I give and devise all other my freehold messuages and real estate situate in the several parishes of Trevethon, Mynyddthuslloyne, and Caldicot, in the county of Monmouth, and all my leasehold houses in the city of Bristol, and also all other my real and leasehold messuages, lands, and hereditaments whatsoever, and whatsoever not hereinbefore specifically disposed of unto my son-in-law J. Jeavons, and my sons Henry Smith and James H. Smith, and my said daughter E. Smith, upon

trust as soon as conveniently may be after my decease to sell the same either together or in parcels, and either by public auction or private contract, to any person or persons willing to become the purchaser or purchasers thereof, or of any part thereof, for such price or prices, or sum or sums of money as to the said trustees or trustee shall seem reasonable, and for promoting and facilitating such sale or sales the trustees or trustee shall or may enter into, make and execute all such contracts, conveyances, insurances, as the said trustees or trustee shall, in their or by his discretion, think proper, and shall or may buy in the said premises or any part thereof, at any auction, and resell the same in manner aforesaid, and also shall or may rescind or vary any contract for sale as to them or him may seem advisable. And I declare that my said trustees or trustee shall stand possessed of and interested in the moneys to arise by such sale or sales (after deducting thereout the expenses attending such sale or sales) in trust to divide the same into seven equal parts or shares."

The will then proceeded to dispose of certain one-seventh shares, and proceeded thus:—

"And as to one other equal seventh part or share of my said residuary estate, I direct my said trustees to retain the same and invest it in manner aforesaid, and to stand possessed thereof upon similar trusts in all respects in favour of my son William, and any wife he may marry, and his children, if any, as are hereinbefore declared of, and concerning the share of my son J. Herbert and his wife and children, and in the event of my son William dying without having been married, then in trust to divide, pay, and transfer his said seventh part or share, from and after his decease, unto and equally his brothers and sisters who may be then living, and the issue of any brother or sister who may be then dead, leaving issue, such issue, nevertheless, to take only the

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share which their deceased parents would have taken if then alive. And as to the remaining equal seventh part or share of my said residuary estate, I direct my said trustees to retain the same and invest it in manner aforesaid, and to stand possessed thereof upon similar trusts in all respects in favour of my son H. Smith, and any wife he may marry, and his children, if any, as are hereinbefore declared of and concerning the share of my son William, with the like limitation over in the event of his dying unmarried. And I bequeath all my personal estate, chattels, goods, moneys, and effects, except what I otherwise bequeath by this my will, or any codicil, unto my said trustees hereinbefore named, upon trust, to sell, call in, and convert into money all my personal estate, and I declare that the last-mentioned trustees and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor shall, by and out of the moneys to arise from the sale, calling in, and conversion into money of my personal estate and effects, pay my personal and testamentary expenses and debts, and the legacies bequeathed by this my will, and my codicil thereto, and subject thereto, do and shall divide and pay the residue of the said moneys between and amongst all my said children in equal shares and proportions. And I hereby direct and my will is that my daughter Elizabeth shall, in her discretion, demise or lease to the said Levi Downdes the said messuages, shop, and premises in High Street, in the town of Abergavenny for any term of years absolute or determinable, so as there be reserved on every such devise the best yearly rent for the same, and so as there be contained in every such demise or lease a condition of re-entry for non-payment of rent or breach of covenant. And I nominate and appoint my said daughter Elizabeth and my said son-in-law John Jeavons, and my said son J. Herbert executrix and executors of this my will, and I authorise and empower them to pay any debts owing to me or

claimed from me, upon any evidence thereof they shall think proper, and to accept any security, real or personal, for any debt or debts owing to me, and to allow such time for the payment thereof as to them or him shall seem reasonable.

The testator died on the 21st of March, 1861, and shortly after his death his daughter Elizabeth and Mr. James Herbert Smith and his son-in-law, John Jeavons, the surviving executrix and executors, proved the will.

The testator also left William Smith and Thomas Smith and Mrs. Such and Mrs. Lawrence, and his son, William Smith, him surviving.

On the 2nd of July, 1860, Elizabeth Smith filed a bill to administer the testator's estate against the other executors. On the 18th of May, 1860, an administration decree was made, and the testator's real and personal estate were ordered to be sold.

James Herbert Smith became bankrupt.

Thomas Lawrence was a member of the firm of Streatfield, Lawrence & Mortimore, which firm became bankrupt.

William Smith was a member of the firm of Smith, Patient & Smith, which firm also became bankrupt.

Creditors and official assignees of the said several firms were duly appointed.

The chief clerk, by his certificate, dated the 29th of June last, found, amongst other things (par. 5), that the personal estate of the testator not specifically bequeathed and still outstanding or undisposed of, consisted of the particulars in the second schedule; and (par. 6) that with regard to certain portions of such outstanding personal estate numbered 3, 7, 16, and 17 in the schedule, the parties agreed that the opinion of the Court should be taken thereon.

The items were set out in the schedule as follows:—

Item 3:—"4000*l.*—a sum due from the testator's son

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William Smith, William Francis Patient, and the late testator's son Henry Smith, deceased, trading under the firm of Messrs. Smith, Patient & Smith, as tanners, at Queen Street, Bermondsey, in the county of Surrey, on a note of hand to the testator, dated April 7, 1847, with interest thereon at 5 per cent. per annum, according to the same note from April 1847."

Item No. 7:—"20,000*l.*—a debt due from said firm of Messrs. Streatfield, Lawrence & Mortimore, or their assignees, they being bankrupt, and secured by two notes of hand, one dated January 2, 1860, from the said firm, therein styled 'Streatfield, Lawrence & Co.,' to said testator for 10,000*l.*; and the other, dated January 29, 1859, from Messrs. Smith, Patient & Smith, to said Messrs. Streatfield, Lawrence & Co. or order, indorsed together to the order of the said testator for 10,000*l.*, with interest thereon at 5 per cent. per annum, according to the same notes from January 3, 1860, less 200*l.* received on account by two payments of 100*l.* each on June 18 and 26, 1860."

Item No. 16:—"4250*l.* loan advanced by the said testator about the year 1834 to his son, the said W. Smith, on his commencing the trade of a tanner, at Bristol, with an unascertained arrear of interest thereon. Cash accounts among the testator's papers show this amount, but notes or other securities for the same, supposed to have existed, are not to be found."

Item No. 17:—"An unascertained balance due to the testator for payments by him on behalf of the said William Smith on winding-up the said trade at Bristol, in or about the year 1840, and any interest thereon."

Argument.

Mr. *Baggallay* and Mr. *Kay*, for the plaintiff, contended that as there were large sums due from William Smith and Thomas Lawrence, the executors were entitled to set off that debt against the legacies.

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Argument.

Mr. *Bacon* and Mr. *De Gex*, for the assignees in bankruptcy of William Smith.—

In *Cherry* v. *Boultbee* (*a*) it was held that the executors of a testatrix were not entitled to set-off the legacies given by her will to her brother, an uncertificated bankrupt, against the debt due from him to her at the date of his bankruptcy.

In all the cases where the principle of set-off has been applied in this court, from *Jeffs* v. *Wood* (*b*) downwards, with the single exception of *Ex parte Man* (*c*), which was of questionable authority, there was a clear case of set-off which the bankruptcy supervening did not affect.

[The VICE-CHANCELLOR.—The term "set-off" is said by the Lord Chancellor, in *Cherry* v. *Boultbee*, to be a very inaccurate expression. The right is rather a right of the executor to retain a sufficient part to satisfy the debt.]

Even supposing the executor could stop the legacy for a debt due from one member of the firm, it was clear from the cases that there could be no set-off of the legacy as against a partnership debt.

THE VICE-CHANCELLOR:—

Judgment.

There is *primâ facie* evidence of the existence of this debt, and no evidence to contradict it. If anything had been adduced on the part of the assignees to raise a doubt as to the amount due from him, I should have been disposed to direct an inquiry in these terms: "What was the amount of the balance due at the time of the testator's death with respect to this loan?" But that is not the question. I am asked to decide that there was no loan at all, and that there was nothing due from the son to the father at the time

(*a*) 2 Keen, 319; s. c. on appeal, 4 M. & C. 442.

(*b*) 2 P. Wms. 128.

(*c*) Mont. & Mac. 210.

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his death in respect of any loan. I think I should not be justified, on the evidence before me, in arriving at such a conclusion. The unascertained balance due must be the subject of further inquiry. As to both sums, it has been argued that, under the circumstances, the amount due in respect of this debt has been barred by the statute; but the executors say that, nevertheless, they are entitled to set off the amount against the legacy. I think that question has been concluded by authority; but, in order to work out the administration of the estate, there must be an inquiry as to what the amount of the set-off is. I have no difficulty in saying, from the evidence before me, that the sum of 4250*l.* ought to be the amount of set-off, and I shall declare that the right to set-off that amount exists.

On the second point, the question is, whether the same principle applies where a debt is not due from the legatee, but from the partnership firm of which that legatee was a member. No direct authority has been cited on either side. It seems to me that the principle which governs the case is this, that the legatee shall not be entitled to receive out of the estate of the testator any part of the bounty intended for him by the testator until he has paid all his obligations in the shape of debts which may be due to that estate. That seems to be an intelligible principle; and it is one which was stated by Lord Cottenham in the case of *Cherry* v. *Boultbee*. In that case Lord Cottenham said that the principle would be applicable, where the executor, who was bound to pay the legacy, was the same person who was entitled to receive payment of the debt. It seems to me that the principle which I have stated is countenanced by what was said by Lord Cottenham in that case. I cannot satisfy my mind that it would be an intelligible principle to act upon, or that I should be justified in making an order that the assignees of this bankrupt partner should

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be allowed to receive the legacy given to an individual partner who is the legatee, so long as the partnership debt of the firm of which he was a member remains undischarged. I do not think "retainer" or "set-off" is a proper expression, for it is not a question of retainer or set-off, but a question of right on the part of the legatee to receive payment of the legacy, having regard to the amount of the debt due to the testator's estate. The declaration will be in those terms.

Judgment.

Third point.—The chief clerk had certified that the only debt of the testator which had been allowed was a specialty debt of 1000*l.* due to Michael Davis, executor of Thomas Jones, deceased, as trustee of the testator's marriage settlement, with interest from the 21st of March, 1860, at 5 per cent.

Argument.

Mr. *Baggallay* and Mr. *Kay*, for the executor, contended that the amount due from the *cestui que trust* of the settlement to the testator ought to be set-off against the debt.

It would be contended that the legatee and debtor were different persons, but the principle still applied, and *Wathen* v. *Smith* (*a*) was an authority in support of that proposition. The Court only looked to the beneficial interest.

Mr. *Malins* and Mr. *Swanston*, for legatees who were interested in relieving the estate, contended that where a legacy was given to a person in the situation of a debtor to the estate, it was, in the absence of any evidence to the contrary, to be taken as a satisfaction of the debt: *Plunkett* v. *Lewis* (*b*), *Davis* v. *Chambers* (*c*).

Mr. *Whitbread*, for the legatee, contended that the

(*a*) 4 Madd. 325. (*b*) 3 Hare, 316. (*c*) 7 De G. M. & G. 386.

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direction to pay debts and legacies as here, made the doctrine of satisfaction inapplicable: *Edmonds* v. *Low* (*a*).

Judgment.

THE VICE-CHANCELLOR:—

It is said that where a legacy is given to a creditor of the testator, the legacy is intended to be in satisfaction of the debt; at least, there is a general presumption of that kind. But the presumption may be rebutted by a slight circumstance; and in a case before Lord Thurlow, where the question turned upon the amount due upon a promissory note, a small circumstance was held to rebut the presumption. But how can the presumption arise where the creditor is a different person from the legatee? It is said that, to prevent circuity, the Court will allow it, and that in the case of *Davis* v. *Chambers*, the Court did allow it, in order to prevent circuity. But in *Davis* v. *Chambers* there was an express declaration by the testator, which clearly showed his intention and relieved the case from every difficulty, because, if any presumption could be said to arise, it was presumption not only of the strongest kind, but which showed what the testator's intention was. In this case the doctrine of satisfaction arises from a presumed intention. In *Davis* v. *Chambers* the declaration put an end to the presumption, and it is in vain to say that the doctrine of presumption would have been acted upon in that case, where the express declaration of intention was stronger than can arise from any doctrine of the Court. Consider what the effect would be if the Court were to listen to the argument as to circuity. The Court directs the debts to be ascertained. The chief clerk has certified that a debt is due to two trustees, but neither of these is the legatee. The legatee is an entirely different person. How, then,

(*a*) 3 K. & J. 318.

is it possible to say that, so long as the trustees remain creditors of the testator's estate, the debt due to them has been satisfied by a legacy bequeathed to another person? It has been argued, that these persons ought to stand as creditors, subject to any question which may be raised about the debt due to them from the *cestui que trust* That does not help the case, because, if they claim the whole sum, the question how to deal with it is one between them and their *cestui que trust.* That question arises upon the construction of an instrument which is not before the Court, and therefore I can discover no ground whatever for saying that these creditors, who have sworn to a 1000*l.* debt, should, in the absence of trustees, have the their debt cut down because they say there is some question between them and their *cestui que trust.* The debt must be paid to the trustees.

Judgment.

The remaining question was, whether the plaintiff, Elizabeth Smith, was entitled to have the real estate devised to her exonerated from the mortgage, or whether, by the operation of the 17 & 18 Vic. c. 113 (Locke King's Act), she took the estate subject to the mortgage. The chief clerk had found that a sum of 1000*l.* and interest was charged upon the house and premises in High Street, Abergavenny, which was devised by the testator to his daughter, Elizabeth Smith, who was devisee of other real estate, and also one of the executors.

Mr. *Baggallay* and Mr. *Kay*, for the plaintiff, contended that the direction to pay the debts out of the personal estate was sufficient to take the case out of the statute. Here the words were, "out of the moneys to arise from the sale, calling in, and conversion into money

Argument.

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Argument.

of my personal estate and effects, to pay my funeral and testamentary expenses, and debts and legacies." In *Woolstencroft* v. *Woolstencroft* (*a*) the words were "out of my estate," which this branch of the Court thought must mean personal estate with which the executrix could alone deal; but Lord Chancellor Campbell, on appeal, thought the words not sufficiently specific. Here it was submitted the case was much stronger.

[The case of *Pembroke* v. *Friend* (*b*) was referred to].

Mr. *Malins* and Mr. *Hetherington* appeared for Mrs. Lawrence.

Mr. *Bacon* and Mr. *De Gex* appeared for the assignees of Smith and Lawrence.

Mr. *Greene*, Mr. *Wigram*, and Mr. *Whitbread* for legatees.

Mr. *C. Swanston* for the other executors.

They all contended that there was not sufficient intention shown so as to take it out of the Act.

THE VICE-CHANCELLOR:—

Judgment.

It is a material circumstance in this case, that the devisee of the mortgaged estate is one of the executors. As executor she is directed to pay all the debts. I know of no principle of construction that will enable me to consider a direction to pay all debts as excluding a mortgage debt. It seems to me that the direction to the executors to pay all the debts out of the personal estate declares a plain intention on the part of the testator that this debt should be so paid. But it has been argued that, in order to prevent the application of

(*a*) *Antè*, vol ii. 192. (*b*) 1 J. & H. 132.

the Act of Parliament which makes the mortgaged estate the primary fund, there must be some more plain declaration of intention. I feel some difficulty from the judgment of Lord Campbell in *Woolstencroft* v. *Woolstencroft*, in deciding any question on this Act of Parliament. If it be the fact that Lord Campbell laid down as the law of this Court, that this Act of Parliament enacts that there must be as plain a declaration to exonerate the mortgaged estate as required by the old law to exonerate the personal estate, I can only say that the language of the Act of Parliament does not seem to me to bear that construction. The language of the Act of Parliament requires only the expression of "any contrary or other intention." It cannot be said that, under the old law of exoneration as to personal estate, the personal estate would have been exonerated by "any contrary or other intention," because, in the case of *Bootle* v. *Blundell* (*c*), the rule laid down by Lord Eldon must be considered as the law of the Court. I should nevertheless have felt myself bound by the decision of Lord Campbell in the case of *Woolstencroft* v. *Woolstencroft*, if the case were the same. But it seems to me that the circumstance that the devise of the mortgaged estate is to one of these executors who have been plainly directed by the testator to pay all his debts out of the personal estate, makes such a distinction between this case and *Woolstencroft* v. *Woolstencroft* as that I cannot consider the language of this testator's will and the construction to be put upon it as bound by that decision. I think there is here a contrary and other intention expressed, and I think it is sufficient evidence of a contrary intention that the testator has directed the devisee of this estate and two other persons to pay the debt out of his personal estate. Declaration accordingly.

(*c*) 19 Ves. 494

BRANCKER *v.* ROBERTS.

Nov. 9th.

Where the rules of a company provided that any member who should, directly or indirectly, engage any merchants' or brokers' work which was charged to the company, or if it were offered him by the principal or servants, should be fined 50*l.* for such work so taken, and that no member should leave without giving the agent six months' notice. The plaintiff, who was a member, gave notice on the 27th of June, 1859, that he would leave on the 30th of June, but before that day entered into an engagement with a merchant, and within six months entered into other agreements.—*Held*, that the plaintiff was liable to be fined for the engagement made prior to the 30th of June, 1859, but not for those made subsequently.

THIS bill was filed by Edward Brancker, carman, at Liverpool, against Thomas Roberts, John Pitts Miller, and five other persons, representing the Carters' Company of the same place.

The bill stated that about 1790 a number of persons carrying on the business of carmen at Liverpool, formed themselves into an association called the Carters' Old Company, the general scheme of which was, that the individual members of the company should find their own horses and carts, which should ordinarily take their stand in public places in Liverpool; that each cart should be taken in succession by customers; and that the payment for work done should be made, not directly to the individual whose cart had been employed, but through the medium of the clerk or secretary of the company, part of whose duty it should be to receive the accounts of the individual members against customers, and send in to each employer a general account of the work done for him by all the members. No deed or other instrument declaratory of the objects of the association had been executed, and the company was never incorporated.

On the 5th of July, 1854, the plaintiff and his brother John Houghton Brancker, being partners in the business of carters, became members of the company. In June, 1856, the plaintiff and his brother dissolved partnership.

The bill alleged that the management of the affairs of the association was vested in a committee of members, and the particular mode in which the operations of the company were carried on was as follows:—

"1. Each member pays 5*l.* entrance fee and 3*l.* a year subscription on each cart and team which is entered; that is to say, which is to be employed in connexion with the said company; this entitles him to a number, and to have the name Old Company affixed to the cart, which also bears his own name, as thus, 'Edward Brancker, No. 10, Old Company, Liverpool.'

"2. This cart, when entered, is privileged to do Old Company's work, or, in other words, to cart for those merchants and others who think fit to employ members of the company.

"3. Many merchants and others at Liverpool employ the carts of members of the company exclusively to do their carting, and it is understood among the carters that certain houses only employ carts bearing the badge of membership.

"4. Members of the company take other work besides what is termed company's work, and participate with other carters in Liverpool (not being members) in the general traffic of the town.

"5. At the end of every month each member sends in his account-book to the clerk or secretary of the company, showing the work done by him as a member for merchants and others. The carter does not fix the charge for cartages. This is done by the company's secretary in accordance with the by-laws of the borough. From this book and the books of the other members the clerk or secretary makes out the general account of each merchant, entering each cartage to the debit of the particular merchant, so that the merchant's account for the month contains the whole cartages done for him by members of the company. Such account is made out in the company's name, and the only clue to the name of the carter is the number of the cart set opposite each item.

"6. The accounts are collected by the clerk or secretary of the company, who makes the best bargain he can

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with the merchants as to allowing discount on payment. The receipt is given by the secretary, agent, or collector of the company for the whole amount, and the various charges are extracted and credited to each member's account with the company. The carter's book is returned by the company as soon as the cartages are extracted.

"7. Every two months the preceding two months' account is paid over to the member by cheque signed by three persons called committeemen of the company, there being first deducted 20*l.* per cent. for discount, and a proportionate part of the subscriptions; for instance, supposing that a member entered in January, he would send in his accounts monthly, but would not receive any money until April, when he would be paid his account, less deductions for January and February.

"8. The 20*l.* per cent. discount is retained to cover the amount of discounts allowed to employers on payment of their accounts, bad debts, and other contingencies.

"9. The subscriptions and entrance fees are applied in payment of the expenses of management and matters connected therewith.

"10. At the end of the year each member's account is made up, and if the 20*l.* per cent. discount retained is found to have more than covered the discount allowed for bad debts and other contingencies, the balance is paid over; if otherwise, the member pays the excess."

On the 27th of June, 1859, the plaintiff, being desirous of withdrawing from the company, wrote to the defendant Miller, the company's secretary, as follows:—"Sir,—I beg to give you notice that I shall resign my proprietorship in the Old Company on the 30th instant, having made arrangements with Messrs. A. Swainson & Sons for their work. I shall incur a penalty of 100*l.*, which you will please to deduct from my account.—Yours faithfully, E. BRANCKER."

The plaintiff, in accordance with the notice, ceased to act in connexion with or as a member of the company from the 30th of June, 1859; and having down to that time done a large amount of work which, according to the usage of the company, would shortly become payable, he in due course applied to the defendant Miller, as the company's secretary, for an account of the moneys then standing to his credit in the company's books, and for payment of the balance. The defendant Miller wholly refused to furnish any account or to pay any such balance, and told the plaintiff that the company claimed all moneys of the plaintiff in their hands or standing to his credit in their books, by way of forfeiture; and that if the plaintiff wished for payment, he must sue the company at law. The plaintiff thereupon instructed his solicitors, Messrs. Carson, Ellis, and Field, of Liverpool, to apply to the company, and a correspondence ensued, which led to the bill being filed.

Shortly after the 28th of August, 1859, the date of the last letter, the defendant Miller sent to the plaintiff's solicitors a copy of the document which the plaintiff was given to understand he was required to sign, and did sign in July, 1854, when his firm became members of the company. It was in the following form:—

"We whose names are hereunto subscribed, proprietors in the Old Company of Carters, do hereby for ourselves severally and respectively abide by and obey all the rules and regulations of the said company which are now in force, and also all rules and regulations which the committee for the time being of the said company may from time to time, or at any time or times hereafter, make relative to the affairs of the said company. And we do also severally promise and agree to pay all fines and forfeitures which the said committee for the time being may inflict upon us respectively for the violation or non-

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performance of the said rules and regulations, or any of them, and that the committee, or the agent, or collector for the time being of the said company, shall and may retain such fines or forfeitures out of the money which may be in or come to their or his hands belonging to us respectively. As witness our hands."

The plaintiff's solicitors wrote to Miller, offering to permit the company to retain 100*l.*; in reply to which the company's solicitor wrote to the plaintiff as follows:—

"46, Castle Street, 5th November, 1859.

"The Old Company of Carters and Brancker.

"Messrs. Carson, Ellis and Field, solicitors.

"Dear Sirs,—On receipt of your last letter of the 29th of October to the committee of this company, I have had placed before me your letters to them, and I advise them to give you the fullest information in their power consistently with their duty to the company.

"The replies to the question you require answering are the following:—

"1st. The following is the account of cash received by the company since the last settlement—

	£	s.	d.
"Balance due to Mr. Brancker on the 31st December, 1858, payable 20th July, 1859	115	14	10
"Work done in January and February, less 20 per cent.	137	0	0
" „ March and April „	118	0	0
" „ May and June „	115	0	0
	"485	14	10

"Cr.

"June 1st, 1859—Cash paid, being the two first months	137	0	0
	"£348	14	10

"I may be allowed to observe, for your information, that the monthly work, less the discount, is payable every two months when the member has three months' work in the company's books, and the final payment for the year ending 31st December is payable the following July.

"It requires the six months or thereabouts for the committee to collect all their then year's old accounts, and to ascertain the losses (if any) and the expenses of the company, &c.

"Your client keeps an account of all the work done by himself, and can, if he pleases, ascertain whether the foregoing sums are correct, as the company's books are only copies of the members' own books of work done.

"2nd. The company will seek to stop from the above balance of 348*l.* 14*s.* 10*d.*, and recover the deficiency of the following penalties or fines:—

	£	*s.*	*d.*
"1st. For soliciting, engaging, and taking the work of five merchants or brokers who had accounts in the company's books at 100*l.*, either before or within six months after leaving the company .	500	0	0
"N.B. There will be a further penalty for every merchant's or broker's business which the late member may engage to do within six months of his resignation, and I understand there are one or two more.			
"2nd. For leaving the company without six months' notice	50	0	0

"3rd. You have already been furnished with copy of the agreement signed by your client on the 5th of July, 1854, also his letter or note of resignation to the company, dated 27th of June last.

"I now enclose copy of the rules or orders inflicting

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the penalties on members, dated 19th of February, 1841, and 1st of August, 1843.

"Yours truly,

(Signed) "S. BROOKER."

"The alleged rules which accompanied the lastly-stated letter were in the words and figures following, that is to say—

"February 19th, 1841.

"Meeting of the Old Company of Carters, held at the office this day.

"William Strettell, Chairman.

"The full members of the committee attended, viz.: Wright, Briscoe, Orton, Williams, Miller, Okell, Hand, Roberts, Walker, Edwards, Standish, Webster.

"Ordered—That any proprietor who may, directly or indirectly, engage any merchants' or brokers' work who is charged in the company, or if it be offered him to do by the principals or any servant of the said house, to be fined in the sum of 50*l.* for each house so taken; or should any house be uncharged, the fine to be the same if taken within six months; or should any proprietor leave the company to evade the fine, and engage or accept the work of any house who is charged or may have been charged within six months, to be fined 50*l.*

(Signed) "WILLIAM STRETTELL,

"Chairman."

"Meeting of the Committee of the Old Company of Carters, held at the office, August 1st, 1843, at 8 p.m.

"William Strettell in the Chair.

"Present — Roberts, Campbell, Walker, Amery, Ashcroft, Miller, Okell, Williams, Taylor, Webster, Hand, Garner.

"Ordered—That the rules made on the 19th February, 1841, which refer to any proprietor taking any merchants' or brokers' work that is charged (see that date for the said rules), to be fined 50*l.*, that the same rules with all the particulars be still in force, excepting the alterations now made. The fines to be 100*l.* each instead of 50*l.* with the said alterations. It was passed unanimously, there being twelve members present.

"Ordered at the meeting, 19th February, 1841. That no proprietor leave the Company without giving the agent six months' notice in writing, under a penalty of 50*l.*

"Ordered—That the above rules dated 19th February, 1841, may be mitigated by the Committee if they deem necessary, according as circumstances may be.

"(Signed.) WILLIAM STRETTELL, Chairman."

"At a meeting of the committee of the Old Company of Carters, held at the office, the 3rd of August, 1859, at 7 p.m.

"Thomas Roberts in the Chair.

"Present — Dulson, Hampson, Treacy, Jones, Boardman, Harrison, Giles, Handy, Bushel.

"Ordered by the Committee, there being eleven members present, that Edward Brancker, a proprietor, having contracted with Messrs. A. Swainson & Son, H. J. Webster & Company, Whitaker, Whitehead & Company, Joseph Brothers, and Jefferson & Taylor for their cartage, the said firms being charged in the Company's books, thereby causing a breach of his agreement with the Company, he being aware of the same, that he be fined the sum of 100*l.* for each firm, according to the rules of the Company signed by him.

"(Signed.) THOMAS ROBERTS, Chairman.

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The plaintiff, by his bill, said he should have been willing to receive the balance of 348*l.* 10*s.*, less 100*l.* fine; but inasmuch as the company insisted on the right to 550*l.*, as above stated, he prayed for an account, and for a declaration that he was not liable to pay the fines, and other consequential relief.

The evidence showed that two of the plaintiff's engagements, including that with Messrs. Swainson abovementioned, were entered into by him before the 30th of June, 1859, when he ceased to be a proprietor in the company; the remaining three were entered into by the plaintiff after the 30th of June, but before the period of six months from that date had expired. It was further agreed, on behalf of the defendants, that not more than 50*l.* should be claimed in respect of the plaintiff's having left the company without giving six months' notice.

Argument.

Mr. *Malins* and Mr. *Hardy* contended, first, that the rules were oppressive and inequitable, and that the plaintiff was entitled to be relieved against them; but even if the rules were not invalid, it was submitted that on the fair construction of them the plaintiff was entitled to relief against the construction that had been put on them.

Mr. *Bacon* and Mr. *Freeling* contended that by the rule of the 19th of February the fine was incurred, whether the offender was actually a member at the time, or whether he entered into the engagement within the six months after he ceased to be a member.

Mr. *Hardy* was heard in reply.

The VICE-CHANCELLOR:—

Judgment.

These rules and orders are expressed in very obscure

terms, but upon attentive examination the language is not, I think, unintelligible. I think it impossible to say that, after this gentleman, the plaintiff, had ceased to be a proprietor and member of this company he was not at liberty to make any arrangement he pleased; and there seems to be no rule preventing him, or any one who has ceased to be a member of the company, from engaging with any merchant's house during a period of six months. But there is very clear language to this effect, that if, whilst he is a member of the company, he engages in the work of any merchant's house, he is liable to a penalty of 50*l.*, which, by a subsequent rule of the company, was increased to 100*l.* My opinion is, therefore, that, it satisfactorily appears that the plaintiff did, whilst he was a proprietor, engage to do the work of two merchants' houses, and of two only. It also appears that he left the company and ceased to be a member on a notice of only three days. I think that, according to the true construction of this rule, by not giving six months' notice, he has incurred a penalty of 50*l.*, because no question as to the amount has been raised by the defendant, and it must be taken as if that sum were agreed to. According to what has been agreed upon by both parties, the fine is only to be 50*l.* But I think that the defendants have unreasonably, improperly, and in a manner contrary to the construction of the rules, insisted upon the plaintiff being liable to pay, and said that he is bound to pay, not only two fines, but five fines; that is to say, two fines for engaging in the work of merchants' houses whilst he was a member of the company, and three more for engaging in the work of merchants' houses within six months after he had ceased to be a member or proprietor of the association. I have already said that I can see no ground for maintaining the contest on this point. Therefore, as to the three latter fines, I must decide

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Judyment.

against the defendants. The case is one in which very obscurely worded rules and orders have given rise to a very expensive litigation. There has been partial failure and partial success, and therefore I am not disposed to give costs on either side. The declaration will be, that it appearing that the plaintiff, whilst he was a proprietor and member of the association in the pleadings mentioned, engaged in the work of two merchants' houses, and left the said association without giving six months' notice, declare that, according to the true construction of the rules and orders of the association, particularly the rules and orders of the 19th of February, 1841, and the 1st of August, 1843, the said plaintiff is liable to pay two fines of 100*l.* and one fine of 50*l.*, which the defendants admit to be the fine to which he is liable for leaving without giving six months' notice, and that he is not liable to pay any other fine. There will be an order for payment of the amount to be ascertained according to this declaration, with interest, and no costs on either side.

THE KING OF PORTUGAL *v.* RUSSELL.

Nov. 10*th.*

Demurrer to a bill stating that the plaintiff had deposited moneys as security against a disputed claim on trust, that if the claimant should within one month bring and diligently prosecute an action, then to satisfy the amount recovered, otherwise on trust for the plaintiff, and stating that the claimant had brought the action and obtained a nominal verdict, with leave to the defendant to move to set aside the verdict, and which was afterwards turned into a special case, not yet determined, and asking for return of the deposit—Overruled.

THE bill was filed by the King of Portugal against Mr. Scott Russell, Viscount Bandeira, and Sir G. Sartorius, praying that the sum of 3076*l.* 8*s.* 6*d.* might be paid to the plaintiff.

The bill stated that by articles of agreement, dated the 16th of November, 1858, between J. Scott Russell, of the one part, and Viscount Bandeira, Minister of Marine for the King of Portugal, of the other part, in consideration of 10,400*l.* to be paid as therein mentioned, and for other considerations therein mentioned, J. S. Russell covenanted with Viscount Bandeira to build and construct a screw fore topsail schooner ship as therein mentioned, and at his cost and risk launch the said ship and place her in safety at Millwall, completed in every respect ready for sea, on or before the 25th of April, 1859; and all shipwright work, labour, and material usually supplied and rendered by shipbuilders for the proper erection of the machinery (manufactured by S. Russell) should be provided by S. Russell, who should also provide joiner's work in the engine-room. And the same ship or vessel to be constructed, &c., at the sole risk and expense of S. Russell, should be delivered at Millwall on or before the 25th of April, 1859, to the order of Sir G. R. Sartorius, ready for sea, finished and equipped in manner similar in all respects to that practised with all ships of the same class in Her Majesty's navy under contracts with the Admiralty, except machinery (the same being manufactured by S. Russell under another contract), armament, furniture, stores, &c., which J. S. Russell should supply the said ship, to be at the sole charge of S. Russell during the construction, &c. &c., and every

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other expense to be incurred with the said ship until the same should have been delivered complete and ready for sea in every respect, and until the same should have been approved of, in writing, by Sir G. R. Sartorius, and accepted by him on behalf of Viscount Bandeira. And it was further agreed between the said parties thereto, that the said ship and all materials in the course of preparation or use, &c., for the same should, after payment of the first instalment of the purchase-money of 10,400*l.*, belong to and be the property of the King of Portugal. And Viscount Bandeira, as such Minister of Marine, in consideration of the said ship being launched, finished, &c., did agree to pay to S. Russell the purchase-money of 10,400*l.* by five instalments, and the fifth sum of 2080*l.* on the delivery, at the time aforesaid, of the said ship, finished, fitted, &c., to the satisfaction, in writing, of Sir G. Sartorius; the said payments to be made by bills drawn by S. Russell on the financial agent of the King of Portugal, and accepted by him, such bill to be payable six months after date, and to bear interest from date of payment at 5*l.* per centum. And it was expressly agreed and ordered that the sum of 10,400*l.* was inclusive of all charges for the ship, &c., and fitted perfectly in every respect, and no demand for extras; but any addition or additions which might be made by order in writing of Sir George Sartorius should be paid for at a price to be previously agreed to in writing. And for the true and punctual performance by the said S. Russell of the covenants thereinbefore contained, the said S. Russell further agreed with Viscount Bandeira, as such Minister of Marine, that if he should not launch and deliver the said ship at the time and place and in manner aforesaid, fitted and completed in manner aforesaid, then and in that case S. Russell should and would pay to Viscount Bandeira 5*l.* each day thereafter that the said ship should not be delivered, finished, fitted, and completed as aforesaid, as

and for liquidated damages, and not by way of penalty only, and the same should be recoverable in any of Her Majesty's Courts of Record at Westminster, or should, at the option of Viscount Bandeira, be deducted from the said 10,000*l.* And it was thereby provided, that if the said ship or vessel should not be launched and delivered by S. Russell at the time thereinbefore appointed and hereinbefore mentioned for the landing and delivery thereof as aforesaid, by reason of any cause not under the control of S. Russell, the same to be proved to the satisfaction of Sir G. R. Sartorius, and to be certified by him in writing, then the penalty should not be enforced for such number of days as Sir G. R. Sartorius should in such certificate name.

That one part of the agreement was signed and executed by S. Russell, and delivered to Viscount Bandeira; another part was executed by Viscount Bandeira, as agent for the King of Portugal, and delivered to S. Russell.

That S. Russell proceeded with building of the ship, and four instalments of 2080*l.* were paid.

That the said ship was not finished within the time specified, and was not equipped according to the terms of the contract; and the defendant S. Russell afterwards agreed to equip the vessel, in the manner in which Viscount Bandeira contended he was required to equip and complete the same, under protest and without prejudice to his right to recover for the same, provided it should ultimately be determined that his contention was right, and after that arrangement the said ship was ultimately equipped; but when the same was completed, the said S. Russell refused to deliver over the same unless he was paid for the cost of so equipping the same vessel, which he alleged were extras, and for which he claimed the sum of 3076*l.* 8*s.* 7*d.*

That it was ultimately agreed the said ship should be delivered to Sir G. R. Sartorius, on behalf of the King

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of Portugal, on payment of 2080*l.* and of the deposit of 3076*l.* 8*s.* 7*d.* in the manner mentioned in the agreement hereinafter mentioned.

That the ship was accordingly delivered to Sir G. R. Sartorius, and the sum of 3076*l.* 8*s.* 7*d.* deposited in the names of Sir G. R. Sartorius and S. Russell upon the trusts of the following agreement:—

The said last mentioned agreement was signed by, and expressed to be made between, the said John Scott Russell of the one part, and the said Sir George Rose Sartorius of the other part, and thereby after reciting the hereinbefore stated agreement of the 16th day of November, 1858, and the payment of the said four sums of 2080*l.* each, and reciting that the said ship or vessel was then ready for delivery at Millwall, aforesaid, to the order of the said Sir George Rose Sartorius, and that the said John Scott Russell alleged that the sum of 3076*l.* 8*s.* 7*d.* was due to him from the said Viscount Sada Bandeira as such Minister of Marine of his most faithful Majesty, as aforesaid, in respect of stores supplied, alleged alterations made, and extra work done by the said John Scott Russell to the said ship or vessel, and he claimed to retain possession of the said ship or vessel, until the said sum of 3076*l.* 8*s.* 7*d.* was paid to him, in addition to the said sum of 2080*l.* residue of the said purchase-money or sum of 10,400*l.*, and that the said Viscount Sada Bandeira alleged that the said ship or vessel was not launched and delivered at the time and place and in manner aforesaid, fitted and completed, and he, as such Minister as aforesaid, claimed a large sum of money from the said John Scott Russell, under the thereinbefore recited agreement, for, or in respect of, such delay in launching and delivering the said ship or vessel; but the said John Scott Russell denied his liability in respect of any such claim as aforesaid, and that for the purpose of releasing the said ship or vessel

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from all claims of the said John Scott Russell, and of deciding the several questions in dispute between the said John Scott Russell and the said Viscount Sada Bandeira, as such Minister of Marine as aforesaid, it had been agreed that the said ship or vessel should be delivered to the said Sir George Rose Sartorius, and the said sum of 2080*l.* be paid upon the terms therein, and hereinafter appearing, and that such arrangements should be entered into as are hereinafter mentioned, and that in pursuance of the said agreement, a bill of exchange for 2132*l.*, being the said sum of 2080*l.* and interest thereon, had been that day delivered to the said John Scott Russell, and the said John Scott Russell had that day delivered the said ship or vessel to the said Sir George Rose Sartorius, and that in further pursuance of the said agreement the sum of 3076*l.* 8*s.* 7*d.* had been that day deposited in the Bank of England on behalf of the said Viscount Sada Bandeira as such Minister as aforesaid, in the joint names of the said Sir George Rose Sartorius and John Scott Russell, upon the trusts and for the purposes therein and hereinafter declared and contained of and concerning the same. It was by the now stating agreement witnessed, that in pursuance of the said agreement, and in consideration of the premises, he, the said John Scott Russell, did thereby renounce all claims of him the said John Scott Russell, upon or against the said ship or vessel, for, or in respect of, the said sum of 2080*l.* residue of the said sum of 10,400*l.*, and all interest due or to grow due for the same, and for or in respect of the said sum of 3076*l.* 8*s.* 7*d.*, so alleged by him to be due to him from the said Viscount Sada Bandeira as such Minister of Marine of his most Faithful Majesty as aforesaid, in respect of stores supplied and extra work done by the said John Scott Russell, to the said ship or vessel as aforesaid, and for, or in respect of, any other matter or thing whatsoever,

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and all rights of him the said John Scott Russell, of lien upon, or detention of the said ship or vessel, for or in respect of the said several sums of money, matters, and things, and every of them. And he, the said John Scott Russell, did thereby agree with the said Sir George Rose Sartorious, that he, the said Sir George Rose Sartorius, should then have and take the said ship or vessel without any lawful interruption or hinderance by him the said John Scott Russell, or any person lawfully or equitably claiming by, from under, or in trust for him, the said John Scott Russell, and he, the said John Scott Russell, did thereby further agree with the said Sir George Rose Sartorius, that he, the said John Scott Russell, his executors or administrators, would, and should forthwith commence, and duly and diligently prosecute an action in one of Her Majesty's superior Courts of Common Law, at Westminister, against the said Viscount Sada Bandeira, his executors or administrators, for the recovery of the sum of 3076*l.* 8*s.* 7*d.*, for stores supplied and work done by him, the said John Scott Russell, to the said ship or vessel, and he, the said John Scott Russell, did thereby further agree with the said Sir George Rose Satorius, that he, the said John Scott Russell, his executors or administrators, would, and should duly appear, to any writ that should be issued out of any one of Her Majesty's said superior Courts of Common Law at Westminister, at the suit of the said Viscount Sada Bandeira, his executors or administrators, in any action that should be brought by the said Viscount Sada Bandeira, his executors or administrators, against the said John Scott Russell, his executors or administrators, for the recovery of any sum of money alleged to be due from him, the said John Scott Russell, to the said Viscount Sada Bandeira as such Minister as aforesaid, under the said hereinbefore stated agreement, for or in respect of delay by him the said John Scott Russell, in launching and delivering the

said ship or vessel. And it was thereby agreed and declared between and by the said John Scott Russell and Sir George Rose Sartorius, that no objection should be taken in the said actions or either of them, that the said Viscount Sada Bandeira was not the proper person to sue or be sued, or that some other party or parties ought to sue or have been sued or joined, as defendant or defendants, or plaintiff or plaintiffs, in the said actions or either of them, and that they, the said John Scott Russell and Sir George Rose Sartorius, would hold the said sum of 3076*l.* 8*s.* 7*d.*, so deposited in their names in the Bank of England as aforesaid, upon trust in case no such action as aforesaid should be brought by the said John Scott Russell, his executors or administrators, against the said Viscount Sada Bandeira, his executors or administrators, within one calendar month from the date of the now stating agreement, or such action should be brought within such one calendar month, but the same should not be duly and diligently prosecuted with effect by the said John Scott Russell, his executors or administrators to pay the said sum of 3076*l.* 8*s.* 7*d.* to the said Viscount Sada Bandeira, or such other person as for the time being should be Minister of Marine of his said most faithful Majesty, or his successor for the time being, or as he, the said Viscount Sada Bandeira, or such other person should direct, but in case such action should be brought within one calendar month from the date of the now stating agreement, and should be duly and diligently prosecuted, and the said John Scott Russell, his executors or administrators, should recover in such action, either by judgment or by the award of any arbitrator to whom such action should be referred, any sum of money then upon trust from and after the determination of any action to be brought by the said Viscount Sada Bandeira, his executors or administrators, against the said John Scott Russell, his executors or adminis-

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trators, as thereinafter mentioned, to pay out of the said sum of 3076*l.* 8*s.* 7*d.*, so deposited as aforesaid to the said John Scott Russell, his executors or administrators such sum of money, and all taxed costs, charges, and expenses adjudged or awarded to him the said John Scott Russell, his executors or adminstrators in such action, after deducting therefrom such sum of money (if any) as the said Viscount Sada Bandeira, his executors or administrators, should recover in any action, which, within one calendar month from the date of the now stating agreement, should be brought and duly and diligently prosecuted by the said Viscount Sada Bandeira, his executors or administrators, against the said John Scott Russell, his executors or admistrators, for or in respect of delay by him the said John Scott Russell in launching or delivering the said ship or vessel, whether such recovery should be by judgment or by the award of any arbitration to whom such action should be referred, and all taxed costs, charges, and expenses adjudged or awarded to him, the said Viscount Sada Bandeira, his executors or administrators, in such action, or so much thereof as such sum of 3076*l.* 8*s.* 7*d.* should be subject to pay, and upon trust to pay the residue (if any) of such sum of 3076*l* 8*s.* 7*d.* to the said Viscount Sada Bandeira, or such other person as for the time being should be Minister of Marine of his said most faithful Majesty or his successor for the time being. And each of them the said John Scott Russell and Sir George Rose Sartorius did thereby agree with the other of them that he, his executors or administrators, would and should sign all such cheques, and execute and do all such documents and things as might be necessary or reasonably required by the other of them, his executors or administrators, for making the several payments thereinbefore provided for, of, or out of the said sum of 3076*l.* 8*s.* 7*d.* so deposited in the Bank of England in their joint names as aforesaid.

9. The said defendant, John Scott Russell, brought his action in her Majesty's Court of Common Pleas, against the said Viscount Sada Bandeira, according to the terms of the said agreement lastly hereinbefore stated, and the same was tried at Kingston, at the Spring Assizes, 1860, and a nominal verdict entered for the Plaintiff in the said action, with leave for the defendant therein to apply to the Court to set the same aside, and enter the verdict for him, and accordingly a rule for that purpose was moved for and obtained in Easter Term, 1860, on the 20th day of April, 1860. Subsequently in the same term, on the 30th day of May, 1860, a rule of the Court of Common Pleas was made, whereby it was ordered that a special case should be forthwith stated between the parties for the opinion of the Court, and be set down for argument, and that the case should be settled by Thomas Dickson Archibald, Esq.

The bill alleged that the draft case was prepared by Mr. S. Russell's solicitors, and sent to the plaintiff's solicitor for perusal on the 27th of September, 1860, when such solicitor was absent from London, and when it was difficult to obtain the advice of counsel; and the said S. Russell, on the 7th of November, obtained an order that Viscount Bandeira, the defendant in the action, should within four days return the draft case approved, and in default, that the case as prepared by S. Russell should be deemed as settled for the opinion of the Court. The draft case was returned approved on the 12th of November, 1860, and the alterations made therein on behalf of Viscount Bandeira were not assented to by S. Russell; but no further steps were taken by him for many months, and when towards the end of that period the plaintiff's solicitor verbally applied to Mr. Archibald, who was to settle the case, to proceed with the reference, Mr. Archibald replied he could not do so, as the plaintiff in the action had not served him with the rule or order of reference.

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Statement.

On the 3rd of July the plaintiff's solicitor wrote to S. Russell's solicitor the following letter:—

"16, Furnival's Inn, 3rd July, 1861.

"Russell *v.* Bandeira.

"Dear Sirs,—It is now nearly eight months since I returned the draft special case approved as altered on behalf of the defendant, and as you have not taken any further step in the matter, I shall assume that you have abandoned the claim, and call upon the trustees to pay over to the Government the amount deposited in the Bank of England.

"I am, dear sir, yours truly,

"JNO. P. THEOBALD.

"Messrs. Freshfields and Newman,
5, Bank Buildings."

On the 17th of July the plaintiff's solicitor received a notice from Mr. S. Russell's solicitor requiring him to attend before Mr. Archibald to settle the case; he attended, but under protest.

That Viscount Bandeira has ceased to be the King of Portugal's Minister of Marine; but Signor Carlos Bento da Silva is now such minister.

That the said action hath not been duly and diligently prosecuted with effect by the said S. Russell; and the plaintiffs submit that, in consequence thereof, the said sum of 3076*l.* 8*s.* 7*d.* ought to be paid to the plaintiff Signor Carlos Bento da Silva on behalf of the King of Portugal.

Argument.

Mr. *Bacon* and Mr. *G. Simpson* appeared for the bill.

Mr. *Malins* and Mr. *Kekewich* contended that the bill was premature, because, until the result of the action has been ascertained, no trust on behalf of the plaintiff arose,

because, until the action be decided one way or other, there was no *cestui que trust.*

THE VICE-CHANCELLOR:—

Judgment.

The defendant by the demurrer admits the allegation in the bill, that the action has not been diligently prosecuted. The case stated by the bill is that of the constitution of a trust, which attached itself to the fund in question the moment it was deposited in the names of trustees. The fund is now standing in the names of the two trustees, with that trust impressed upon it. According to the declaration of the trust, the events upon which the ultimate right to the fund may be determined have not yet occurred. The plaintiff indeed avers that, upon one construction of the trust, an event has occurred from the neglect and delay of the defendant which entitles him to the whole fund. But there is no view of the case which shows that the fund is not a trust fund, or that the defendant, who demurs, is not one of the trustees in whose name the fund stands. Upon the true construction of the declaration of trust must depend the question whether the plaintiff or the defendant is entitled to the fund in its entirety, or in certain proportions. The bill is one to which a demurrer cannot be maintained; and the demurrer must therefore be overruled. It has been said that crowned heads do not ask for costs; but Mr. Simpson has made the plaintiff in this case come humbly to the Court, and if the King of Portugal thinks it no disparagement to his dignity to receive costs, they cannot be refused to him. The last crowned head (the Emperor of Austria) who sued in this Court disclaimed before this branch of the Court to accept costs. There will be leave given to amend the bill, and six weeks given from the service of the amended bill to answer.

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Nov. 14*th* & 15*th*.

RICKARDS *v.* GLEDSTANES.

Notice of the assignment of a reversionary interest given to the solicitor of the trustees. —*Held*, notice to the trustees, so as to take it out of the order and disposition of the assign or on his insolvency.

BY a settlement, dated 2nd of September, 1829, Mr. Venables was entitled to a vested interest in one-fourth of a sum of 15,000*l.*, expectant on the decease of his mother, unless she should otherwise appoint, or except in case of her second marriage. He was also entitled under the will of his father, who died in 1857, to a vested reversion expectant on the death of his mother (and after payment thereout of the sum of 1000*l.* as by the will directed) in one-fourth part of the sum of 1050*l.* stock then standing in his father's name in the books of the East India Company, and also in one-fourth part of ten shares in the Globe Insurance Office, also then standing in the name of his father.

Messrs. Bridges and Sons were the solicitors of the trustees, and also of Elizabeth Scriven.

On the 30th of July, 1859, Mr. Venables, being indebted to the plaintiff Edward Henry Rickards in the sum of 500*l.* and interest, executed a further charge of the said reversionary interests with that sum in manner following:—

"29, Lincoln's Inn Fields, 30th July, 1859.

"Sir,—In consideration of you this day lending me the sum of 150*l.*, and of my being already indebted to you in the sum of 350*l.*, I hereby charge and make liable to you all my estate, right and interest, under the will of my late father and mother, and under the settlement made on the marrriage of my father and mother, with the due payment thereof with interest, and I engage and undertake to make and execute to you any more formal or other mortgage security which you may be advised to require of me; and I authorize and empower you, if you think it necessary for your own interest, to pay off the existing mortgage of 500*l.* due thereon to Messrs. Bridges and Son, or their

client, and to take an assignment thereof, and generally to act in the premises in my name.

"T. EVELYN VENABLES.

"To E. H. Rickards, Esq.,
Lincoln's Inn Fields."

E. Venables subsequently became insolvent, and by an order dated the 5th of July, 1860, his estate and effects became vested in the defendant Gledstanes.

By a deed, dated the 14th of April, 1860, Venables assigned the said three reversionary interests to the defendant Elizabeth Scriven, by way of mortgage, to secure repayment of 500*l.* and interest.

On the 1st of October, 1859, the plaintiff sent the following notice to Messrs. Bridges and Son, the solicitors of the trustees:—

"In re Venables and the Reversionary Society.

"Dear Sir,—Be so good as to inform me what day this will be settled. I have, as I mentioned to you, at the Accountant-General's office, a claim of 500*l.* to be paid out of it, and to secure which I have an equitable charge and judgment, which latter I have delayed signing, with a view to save Mr. Venables expense as long as I could do.

"Yours faithfully,
"E. H. RICKARDS.

"Messrs. Bridges and Son."

The plaintiff now filed this bill to redeem Scriven.

The bill prayed that an account might be taken of what was due to the above-named defendant Elizabeth Scriven for principal and interest upon her said mortgage, and that her costs might be taxed; and that, upon payment by the plaintiff to the defendant of what should be found due to her for such principal, interest, and costs, as the court should direct, she might be ordered to reassign to the plaintiff; also that an account might be taken of what was due for principal and interest on the mortgage

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of the plaintiff, and that the defendants Gledstanes and other incumbrancers subsequent to the plaintiff might be decreed to pay to the plaintiff the amount which should be so found due, together with his costs of the suit, by a short day, or in default thereof, that the said last-mentioned defendants, and all persons claiming under them, might be foreclosed.

The assignee in insolvency, Gledstanes, by his answer, said that, to the best of his information and belief, no notice of the assignment to the plaintiff, or of the charges or alleged charges of the other defendants, was ever given to the trustees of the settlement of the 2d of September, 1829, before the arrest of the insolvent; and he submitted that, as against such of the alleged incumbrancers as had not given notice to the said trustees before the insolvent's arrest, the said reversionary interests were in the order and disposition of the insolvent at the time of his insolvency, and that they were not entitled to any charge as against him, the assignee (*a*).

The plaintiff, in his affidavit, alleged that early in July, 1859, Mr. Venables called on him and requested this deponent to lend him 350*l.*, in anticipation of a large loan which he was engaged then negotiating with a reversionary interest society, upon the security of his reversionary interest under the settlement of the 2d of September, 1829, and under the will of his father; and Mr. Venables then represented to deponent that Messrs. Bridges and Son were solicitors for the trustees of the settlement, "and that the said trustees and their said solicitors were aware that he was about to borrow money upon the security of his said reversionary interest," and showed deponent a letter from Messrs. Bridges and Son, dated the 28th of June preceding, to him, in which they said: "We have seen the solicitors of the reversionary com-

(*a*) 1 & 2 Vic. c. 57.

pany of which you are desirous of borrowing money on your reversion, and we think, on the whole, that it may be your best course to raise money in that quarter, rather than from an individual. We are given to understand that an insurance on your life will not be required, and that the office will be satisfied with an assurance of the goodness of the trust securities, without going to the expense of investigating the titles of the mortgaged estates. . . . If you should still determine to raise money of the office, we will not object to furnish necessary information, and produce the trust-deeds."

The plaintiff further deposed that he requested his managing clerk to take the above letter to Messrs. Bridges and Son, and to make inquiries. The clerk swore that, on the 6th of July, he accordingly saw Mr. Bridges, sen., and was informed by him that the statements made by Mr. Venables were correct; that the firm of Bridges and Son did acts as solicitors for the trustees of the said settlement, and had in their possession the deeds relating to the trust as the trustees' solicitors. On the same day this deponent informed the plaintiff, and the plaintiff deposed that in consequence of this information he advanced the two sums 350*l.* and 150*l.*

On the 1st of October, 1859, the plaintiff wrote to Messrs. Bridges and Son the letter above given.

On the 3rd of November, 1859, a copy of the letter of the 30th of July, 1860, was sent by the plaintiff to Messrs. Bridges and Son.

Other creditors subsequently obtained judgments which they registered under the 1 & 2 Vic. c. 110, and on the 20th of October, and 31st of December, 1859, gave notice to Messrs. Bridges and Son of their respective claims.

The only evidence that notice was given to the trustees was as follows:—A letter from Mrs. Venables, the mother of the insolvent, and also one of the trustees of the settle-

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ment, stating that, to the best of her recollection and belief, she had no notice from the plaintiff that that person, S. Venables, had assigned to Rickards any money on his interest under his father's will, and that she had been all along ignorant of her son's affairs.

The Rev. Mr. King, another trustee, said that he had never, to his knowledge, received any notice, verbal or in writing, from the plaintiff.

Mr. Sturt who was the surviving trustee under the settlement, said he had no recollection whatever of any notice in writing being served on him relating to the plaintiff's security; but, on being cross-examined, he admitted that he had heard of Mr. Venables trying to raise money on the reversion of the fund of which he was trustee. He said that Messrs. Bridges had told him that Mr. Venables had raised money on his reversion. He further said he was not aware of any security being given except to Miss Scriven and Mr. Rickards. He had no positive recollection of the amount of Mr. Rickard's claim. He was not aware that Messrs. Bridges told him that Mr. Rickards had advanced money previous to the bill being filed.

The defendant Gledstanes, who was assignee in insolvency of Venables, took an objection by his answer that there was not sufficient notice to the trustees to take the reversion out of the order and disposition of the insolvent, and therefore claimed the fund, subject only to Scriven's mortgagee.

Argument.

Mr. *Bacon, Q.C.*, and Mr. *Gill*, for the plaintiff, contended that notice to the solicitor of the trustees was actual notice to the trustee, and cited *France* v. *Woods* (*a*), *Foster* v. *Blackstone* (*b*), *Tibits* v. *George* (*c*), *In re Hennessy* (*d*), *Espin* v. *Pemberton* (*e*).

(*a*) Tamlyn. 172.
(*b*) 1 M. & K. 297.
(*c*) 5 A. & E. 107—115.
(*d*) 2 D. & W. 555.
(*e*) 3 De G. & Jones 547; S. C. 4 Drewr. 333.

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Argument.

Mr. *Malins*, and Mr. *Freeling*, for the defendant Gledstanes. The question was, whether sufficient notice had been given to the trustees of the two intruments, to take the property out of the order and disposition and reputed ownership of the insolvent, under the 57th section of the 1 & 2 Vict. c. 110. A reversionary interest was doubtless within the apparent ownership of the insolvent, if the assignee had not given notice of the assignment to the trustees. There was no allegation in the bill that notice had been given to the executors of the will; and the evidence showed that they, at any rate, had received no notice. Even if sufficient notice had been given to the trustee of the settled fund, which upon the evidence was very uncertain, still the question then remained, whether notice to the solicitors was sufficient notice to the executors and trustees of the will, so as to take the property out of the insolvent's order and disposition. The cases of *Etty* v. *Bridges* (*a*), *Foster* v. *Blackstone* (*b*), *Ex parte Carbis* (*c*), *Re Rawbone's Bequest* (*d*), were cited to show that notice to the solicitors is not sufficient, unless such notice is sent to them as solicitors for the trustees, and for the purpose of being communicated to the trustees. *Bartlett* v. *Bartlett* (*e*), was referred to.

Mr. *W. D. Gardiner* appeared for one of the judgment creditors.

Mr. *Lovell* held a watching brief for Mr. Venables, but

His HONOUR said he could not allow the insolvent to be heard.

THE VICE-CHANCELLOR:—

Judgment.

The plaintiff has shown that notice was given to the

(*a*) 2 Y. & Col. C. C. 486.
(*b*) 1 Myl. & K. 297.
(*c*) 1 Mont & Ayr. 693 note
(*d*) 3 K. & J. 300-476.
(*e*) 1 De G. & J. 127.

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solicitors of the trustees, and that is sufficient to take the fund out of the order and disposition of the insolvent. There must be a decree as prayed for the redemption of the first mortgage, against the successive incumbrancers and judgment creditors. The decree must be without prejudice to the question of priority among the judgment creditors. This is not a case in which the Court ought to decree a sale.

1861.
Nov. 25th.

MARRIOTT *v.* THE ANCHOR REVERSIONARY COMPANY (LIMITED).

Motion that a former solicitor of the plaintiff who had declined on the ground of privilege to answer to whom he had applied on behalf of the plaintiff might attend at his own expense before the examiner, and answer the question.—Refused with costs.

THE bill was filed in this case by the plaintiff, who was the owner of the steamship Orwell, for a declaration that the company ought to be charged with the value of the vessel at the time of, and at a reasonable time after their taking possession of her; for an account of what was due to the defendants in respect of the mortgage; that in taking such account, the defendants might not be allowed to charge the plaintiff with any losses consequent on the trading by them with the vessel; the plaintiff offering to pay what, if anything, should be found due from him; but if it should appear that a balance was due to him, for payment thereof with interest by the defendants.

In November 1860, on the hearing of the cause, his Honour made a declaration that, having regard to the way in which the defendants dealt with the steamship, the defendants, in taking the accounts, were to be charged with the value of the steamship at the time when they took possession; and the chief clerk was directed to ascertain and state what he should find to be the fair

value of the said steamship when such possession was taken.(a)

The plaintiff filed affidavits, and the defendants obtained an appointment for the cross-examination of the witnesses, and also subpœned a Mr. Tripp, who had formerly acted for the plaintiff as his solicitor in the matter of the Orwell.

Statement.

Mr. *Watkin Williams*, on behalf of the defendants, asked the witness the following question:—

"Did you, in the spring of 1858, procure a survey to be made of the Orwell?"

Ans. "I did not. I then made an application to certain parties in the city upon the subject of the Orwell, but I did so as the solicitor of the plaintiff."

Ques. "To whom did you make the application?"

Ans. "What I did I did as Mr. Marriott's solicitor, and I decline to answer the question without his permission."

The Examiner allowed the objection.

The defendants subsequently served the plaintiff with a notice of motion in the following form:—

"Take notice, that the Court will be moved by counsel on behalf of the defendants, that you Mr. Stephen Tripp be ordered to attend before Charles Otter, Esq., one of the examiners of the Court, and answer the question which you objected and refused to answer upon your examination before him on the 1st November, 1861. That is to say—To whom did you make the application? meaning the application on the subject of the Orwell, then deposed to by you in your answers to other questions, and that you may be ordered to pay to the defendants the costs of this application.

Mr. *Dickinson*, in support of the motion, contended that the name of the person to whom the witness had

(a) See *Ante* Vol. 2, 457; affirmed on appeal.

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made the application could in no sense be a privileged professional communication. It could not be contended that the statement of the name of the person to whom he had applied was a piece of information which had been confided to the solicitor by his client. It did not even appear that the name was communicated to the solicitor directly by the client. Where the protection of the Court was claimed, it must be shown that the communications came distinctly within the rule; that they were made by the client to his solicitor for the purpose of obtaining legal advice, but there was nothing in this case to show that legal advice was the object of the client. In *Sawyer* v. *Birchmore* (*a*), Lord Cottenham said: "The authorities show that letters communicated from collateral quarters to which the interrogatories clearly point, are not protected, and the witness is bound to answer questions seeking information as to matters of fact as distinguished from matters of confidential communication; and in *Dwyer* v. *Collins* (*b*), it was held "that the privilege of the relation of attorney and client does not extend to matters of fact, which the attorney knows by any other means than by confidential communications with his client, though, if he had not been employed as attorney, he probably would not have known them." The cases of *Re The Mexican and South American Company* (*c*), *Bramwell* v. *Lucas* (*d*), and *Desborough* v. *Rawlins* (*e*) were referred to.

Mr. *Malins* and Mr. *De Longueville Giffard* appeared for the plaintiff and Mr. Tripp, but were not called upon.

Judgment.

THE VICE-CHANCELLOR:—

The order which I am called upon by this motion to

(*a*) 3 M. & K. 572.
(*b*) 7 Ex. 639.
(*c*) 27 Beav. 474.
(*d*) 2 B. & C. 745.
(*e*) 3 M. & Cr. 515.

make would be a most improper one. In this case the defendants have taken the witness's answer, and have said, "Disclose the name of the person to whom you made the application." They should have gone on to show that the witness got this name, not from his client, but from somebody else. No doubt it is the duty of a defendant, in answering, to state the facts fully, but I cannot say that it was the duty of a witness to have answered this question, when he was not asked further as to the person from whom he obtained the names of the persons to whom he applied. I think there has been a miscarriage. The witness was examined by counsel, and I think if counsel had gone further they might possibly have extracted this information. But to make an order in the terms of this notice of motion would be a most improper thing for me to do. There seems to have been some confusion between the rule of what has to be done by a defendant who is required to answer interrogatories to a bill, and what has to be done by a witness. In the case of *Dwyer* v. *Collins*, which Mr. Best has referred to in his very remarkable book on Evidence (edit. 1860, p. 734), the Court held, "that the relation of attorney and client prevented the former from disclosing any communication made to him in the ordinary course of his employment, and on the faith of the confidence which the client reposed in his legal adviser," and then followed the passage which had been cited at the bar. The privilege of the relation includes all media of communication between an attorney and his client, such as clerks, interpreters, and agents. I think the defendants might have gone further, and asked the witness more; but they do not seem to have thought it worth while. They have not shown that the witness was not relieved from the necessity of answering; and in this case I might be violating the privilege if I were to grant the application. The motion must be refused with costs.

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Nov. 15 & 16.

A testator, having bequeathed numerous pecuniary legacies, some of them to charities, gave the residue of his real and personal estate to trustees on trust to sell and thereout to pay his debts and the legacies *herein* mentioned, and further directed the before-mentioned charitable bequests to be paid, and that the proceeds of such part of his estate, as the law did not permit to be given to charities should be first applied in payment of such of the legacies herein mentioned as were not given to charities. He further directed that no charitable bequest should be legally payable till six months after his decease. By a codicil he gave numerous other charitable legacies, and gave the residue of his property among charitable legacies.

Held, that the words "herein mentioned" included the legacies given by the will and codicil, taken together.

Secondly, *held* that, having regard to the distinction made in the will between property capable of being bequeathed for charitable purposes, and property not so applicable; the word "property" in the codicil, signified such property as was legally applicable to the purpose of the legacy.

Thirdly, that the charitable legacies were not payable on the expiration of six months, but in the ordinary way.

JOHN HINE, of Leeford, of East Budleigh, Devon, by his will, dated the 18th February, 1857, after giving numerous pecuniary legacies to charities and individuals, proceeded as follows:—

"I give, devise, and bequeath all the rest, residue, and remainder of my real and personal estate and effects (and including all property, either belonging to me, or over which I have or shall have power to appoint, at the time of my death), to the said George Jauncey, David Robert Grant Walker, and my solicitor, John Daw, of Exeter, their heirs, executors, administrators, and assigns respectively, upon trust, to sell the said rest, residue, and remainder of my said real estate, and either together or in parcels, by public auction or private contract, with power to make any special conditions as to title or otherwise, and with power to buy in the premises at any public sale, or to rescind, either on terms or gratuitously, any contract, and to resell without being answerable for any loss, and to convert and get in my residuary personal estate, and out of the moneys to arise from such real and personal estate to pay my debts, funeral, and testamentary expenses, and the several legacies *herein* mentioned, and (after payment of the legacies to my executors, and the costs and charges

hereinafter mentioned), to divide the residue of such moneys into eighteen equal portions, and to pay six of such portions to the Devon and Exeter Hospital at Exeter, and two other of such portions to the Deaf and Dumb Asylum at Exeter, and two other of such portions to the Blind Asylum at Exeter, and four other of such portions to the North Devon Infirmary at Barnstaple, and two other of such portions to the Society for Promoting the Employment of Additional Curates in Populous Places, whose offices are at Whitehall, London, and one other of such portions to the Christian Knowledge Society, and the other of such portions to the Incorporated Society for the Propagation of the Gospel in Foreign Parts; and I direct that the before-mentioned charitable bequests, legacies, or shares of residue, shall be paid to the treasurers for the time being of the respective societies for the benefit of such societies, and I declare that the proceeds of such part of my real and residuary personal estate as the law does not permit to be given or appointed by will to charitable purposes, shall be first applied, as far as the same will extend, towards payment of such of the legacies herein mentioned as are not given to charitable institutions. And I direct that no charitable bequest shall be legally payable until the expiration of six calendar months from the time of my decease. Nevertheless, I declare that after payment of the several bequests herein contained, as are not charitable, the trustees or trustee for the time being shall have a discretionary power as to the payment of the aforesaid charitable bequests."

The testator made a codicil to his will, dated 12th April, 1858, on which no questions were raised. He made a second codicil, dated the 19th February, 1859, by which he revoked the "order for the residue of his property, after paying all legacies specified in his will, and also the codicil of the 12th April, 1858, being

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divided, as therein directed in the said will, between the Exeter and Devon Hospital, the Deaf and Dumb Asylum, the Blind Asylum, the North Devon Infirmary at Barnstaple, the Society for Promoting Additional Curates in Populous Places, the Christian Knowledge Society, and the Society for the Propagation of the Gospel in Foreign Parts, and wherein, therefore, he gave a number of pecuniary legacies to charitable institutions. The will then concluded as follows:—

"I give and bequeath the residue of my property to the following charitable societies, to be divided equally among them, viz., the Devon and Exeter Hospital, the Society for Promoting Additional Curates in Populous Places, the Christian Knowledge Society, the Medical Benevolent Fund, the Royal Benevolent College, the Naval School at Richmond, and the Infant Orphan Asylum at Wanstead."

The testator died on the 18th March, 1859, without altering his will, and the will was duly proved by the executors. There was some doubt as to who were the next of kin at the time of his death, and a question was also raised as to whether the direction contained in the will, that the proceeds of such parts of the testator's estate as could not by law be applied for charitable legacies, should be extended to the legacies given by the codicils. Under these circumstances this bill was filed, to which the Attorney-General was made a defendant.

A decree was made on the 25th June, 1860; and the chief clerk, by his certificate, dated the 1st July, 1861, certified that, "assuming that all the brothers and sisters of William Hine, the grandfather of the testator, other than his (the grandfather's) brother, Thomas Hine, and their children and grandchildren (if any), died in the testator's lifetime, as to which no evidence had been

produced," the next of kin were the persons therein named.

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It appeared from the certificate that the testator's pure personalty amounted approximately to 80,000*l.*; his impure, or mixed personalty, to 23,000*l.*, making a total of about 103,000*l.* His specific charitable legacies given by the will amounted to about 6000*l.*: those given by the codicil to about 71,000*l.*, making a total of specific charitable legacies of about 77,000*l.* His general legacies (not charitable) given by the will amounted to about 13,000*l.*: by the codicil to 1000*l.*, making a total of general legacies of about 14,000*l.*; general total of legacies about 91,000*l.* It thus appeared that there was sufficient pure personalty to pay all the charitable legacies, and sufficient mixed personalty to pay all the general legacies.

Argument.

Mr. *Malins* and Mr. *Dickinson* for the trustees.

There were three questions for the decision of the Court:—

First, whether the direction in the will to apply the impure personal estate in payment of the non-charitable legacies herein mentioned extended to legacies given by the codicil, or, in other words, whether the will and codicil were to be read together.

Secondly, whether the charitable legacies were payable at the expiration of six months after the testator's death.

Thirdly, whether the word property, used in the codicil, must be construed to mean his pure and mixed property, or only that by law applicable to charity.

Mr. *Elmesley* and *T. C. Wright*, for the Society for Promoting Additional Curates in Populous Places, on the first point, contended that the will and codicil must be read together; and, therefore, the direction in the

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will extended to the codicil. The effect of that would be, that the general legacies, both in the will and codicil, must come out of the mixed fund.

On the second point, they contended that the meaning of the direction in the will as to payment was, that the legacies were payable at the end of six months.

On the third point, they contended that the word property, in the codicil, must be construed to mean property by law applicable to charity.

It was quite clear the testator was aware of the distinction, and therefore the Court would hold, that when he used the word property, he used it in a sense in which he knew the gift could take effect.

They cited *Williams* v. *Hughes* (*a*), *Williams* v. *Kershaw* (*b*), *Tempest* v. *Tempest* (*c*), *Eyre* v. *Marsden* (*d*), as to costs.

Mr. *C. Swanston*, for the Devon and Exeter Hospital, took the same view, submitted part of the fund consisted of arrears of rent, which was clearly not within the Statute Mortmain: *Edwards* v. *Hall*.

Mr. *Hetherington*, Mr. *G. L. Russell*, Mr. *C. M. Roupell*, and Mr. *F. Webb* appeared for other charitable societies, and took the same view.

Mr. *Greene* and Mr. *Rowcliffe*, for the persons who, though not so found, were understood to be next of kin.

The general rule, no doubt, was that a will and codicil were one instrument; but, for the purpose of construction there were cases, and this was one in which the will and codicil were not one instrument. It was sub-

(*a*) 24 Beav. 474.
(*b*) Clk & F. 111; s. c. 1 Keen, 274 note.
(*c*) 7 De G. M. & G. 470.
(*d* 4 My. & C. 245.

mitted that the word herein in the will, meant only the will, as there was nothing, either in will or codicil, to extend its meaning.

The question, then, was this: the testator gave pecuniary legacies, which he directed to be paid out of impure personal estate. He also gave legacies to charities without any direction, and the assets consisted of about 80,000*l.* pure personalty, and 20,000*l.* impure; then he gave his residuary estate to charities. After payment of those legacies directed to be paid out of his impure personal estate, which, it was submitted, should form one fund with the personalty, out of which the charitable legacies were to be paid, it was submitted that as one proportion of that fund was inapplicable to the payment of charitable legacies, the charitable legacies must abate in the proportion which the balance of the mixed fund bore to the pure personalty, and to that extent, and there was an intestacy: *Bonner* v. *Bonner* (*a*), was cited.

Secondly, it was contended that by the word "property," in the codicil, the testator meant all his property.

They cited *Strong* v. *Ingram* (*b*), *Radburn* v. *Jervis* (*c*), *Early* v. *Benbow* (*d*), *The Philanthropic Society* v. *Kemp* (*e*), *Robinson* v. *Geldart* (*f*).

Mr. *Bacon* and Mr. *Pemberton* for the other person, understood to be the next of kin, but not so found, adopted the same view, and cited the cases of *Hall* v. *Severne* (*g*), *Rooke* v. *Worrall* (*h*), and *Dugdale* v. *Dugdale* (*i*), as to costs, *the Earl of Shaftesbury* v. *the Duke of Marlborough* (*k*).

(*a*) 13 Ves. 379.
(*b*) 6 Sim. 197.
(*c*) 3 Beav. 450.
(*d*) 2 Coll. 342-355.
(*e*) 4 Beav. 581.
(*f*) 3 M. & G. 735.
(*g*) 9 Sim. 515.
(*h*) 11 Sim. 216.
(*i*) 12 Beav. 247.
(*k*) 7 Sim. 237.

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Mr. *Batten* appeared for Henry Hine, whom the chief clerk ha dfound not to be one of the kin, and asked for his costs, which his Honour gave him up to and inclusive of this hearing.

Argument.

Mr. *Sayer* appeared for a devisee in the first codicil.

Mr. *Wikens* appeared for the Attorney-General.

The VICE-CHANCELLOR:—

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The first question is upon the meaning of the word "herein," as used in that clause, in which the testator directs that his mixed personal estate should be first applied as far as it will extend in payment of the legacies "herein mentioned." It is contended that the word "herein" so used in this clause of the will is to be applied only to the legacies given in the will, and that the legacies given by the subsequent codicils are not within the meaning of the words "legacies herein mentioned" as given by the will. But the word "herein" occurs in a previous part of the will; and it is a legitimate mode of construction that, if the same word be used in the same instrument, and if it be very clear and beyond doubt what the meaning of it is on the occasion of the first use, unless it be still more or equally clear that it is afterwards used in a different sense, it must be held that the word is afterwards used in the same sense as on the first occasion of its being used. The clause which directs the mixed personal estate to be applied as far as it will extend, first, in payment of legacies which are not charitable legacies, is an unusual clause. I do not recollect such a clause occurring before in any other will. But the meaning and object of the testator are perfectly clear. He has given legacies to a large amount to charity, and unless he had made this express direction, which appropriates that sum of personal estate out of which charitable

legacies cannot by law be paid, to the payment of other legacies, payment of which might lawfully be made out of it, the extent of the benefit he intended to charity might have greatly failed. Therefore, beyond all question, there is a general intention in this clause in favour of the charities which were the objects of his bounty. Any words occurring in such a clause, where it appears that the clause is intended for the benefit of a certain class of legatees, must be construed with the view of giving effect to the intention of benefit by it. Afterwards, by the codicil, the testator alters his intention with regard to the amount to be given to various legatees, who were clearly legatees by the will in those parts of it which were antecedent to the clause in question. Now, that circumstance alone ought to have a due effect, where there is a doubt as to the meaning of a word, in giving to it that effect which would best effectuate the general intention of the testator. It has been said that the meaning is perfectly clear, and that when a testator says what this testator has said in this particular clause, that the proceeds of such parts of his personal estate as are a mixed fund "shall be first applied, as far as the same will extend, towards payment of such of the legacies herein mentioned as are not given to charitable institutions," he only means those legacies which are mentioned in the will to the exclusion of those mentioned in the codicil. Bnt, there is one clear principle of construction of a will and codicil, and that is, that a will and codicil constitute but one instrument, and if that be a sound principle—and it is acknowledged and must be acknowledged to be so, with certain limitations I shall presently mention—it is quite plain that when the testator speaks of "herein," he includes all the legacies both in the will and codicil. But there are authorities which show that where, upon the question of a charge of debts upon land, a similar expression was

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used, the Court did not allow its decision to be governed by the view, that both will and codicil made but one instrument, but put a limited construction upon the word "hereby," which is analagous to the word "herein," and would not consider that the legacies in the codicil were intended to be included in the charge. But, there is a wide difference between the question of how far a charge upon land is to be extended in favour of certain individuals, and one like this where the Court has to decide upon the construction of the will, to what extent the charge is to be given, If there is a doubt about it, the leaning of the Court is always to hold that, upon the construction of the will, it is not a charge at all. But although that course of decision, which, so far as I know, was first introduced by Lord Chancellor Erskine in the case of *Bonner* v. *Bonner*, the first case which has been cited, has subsequently been followed by other judges, and therefore is a principle of decision not to be questioned. Yet the case of *Rooke* v. *Worrall*, which was very properly adverted to by Mr. Pemberton, shows that even where there is a charge, the Court will look at other parts of the will, and see whether in the context there is anything which will give a more extensive application to the word "hereby" or "herein," so as to include all the legacies given by the will and codicil, which the law considers as one instrument. In the case of *Rooke* v. *Worrall*, the Vice-Chancellor of England extended the charge given by the codicil, although the will commenced with the words "I hereby," and there were subsequent words which rather tended to show that he intended to limit the extent of the charge. In that case the Court held the legacies in the codicil to be included in the charge. Therefore, in the case of a charge upon lands where the Court has to construe words of this description, and is asked to limit them to legacies given by the will, it has not pressed the rule to an absolute

extent, and it would be highly incovenient if it had done so, for the larger and more wholesome rule that the will and codicil are but one instrument ought, as far as possible, to be adopted. In this case it seems to me that the use of the word is entirely within the principle of the decision in *Rooke* v. *Worrall,* for where the word is used in the previous part of the will, it seems impossible, upon a just construction, to consider that the testator meant to limit it to those legacies which were given only by the will. The first use of the word "herein" is where he provides that his executors should, out of the moneys to arise from his real and personal estate, pay his debts, funeral and testamentary expenses, and "the several legacies herein mentioned, and (after payment of the legacies to any executor, and the costs and charges hereinafter mentioned) divide the residue of such moneys" into eighteen equal portions, &c. Now, I think it is impossible to say that he meant that residue which, using the word in its literal sense here, would consist of what would remain after payment of the legacies given by the will. The residue is the amount which, upon a rational ground of construction, would remain after payment of the legacies given by the will alone. Therefore it is reasonably clear, upon the construction of this will, that the words "herein mentioned," where they were first used, mean, "in the will and codicil," and that every legacy in the codicils as much as in the will, is described by the words "herein mentioned." If that be so, I must adhere to that wholesome rule of construction to which I have already adverted, that where a testator has used words with a plain meaning of one word, it should not have a more restricted meaning where it was afterwards used. Therefore, upon two grounds—firstly, upon the general intention in favour of charity in the particular clause; and, secondly, that where a word previously mentioned has a wider and more general intention, that wider and more general intention is that

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by which I am bound—I must decide that the word "herein" includes the legacies given by both the will and the codicil. That disposes of the first question. The next question is one of a singular kind, and is certainly attended with very considerable difficulty. In his codicil the testator has given the residue of his property, using the word "property" to seven different charitable institutions, which he mentions. The language is important, because the first part of it countenances the argument which has been maintained by those who insist that the word "property," as used in this residuary clause, includes property of every kind, real property and pure and mixed personalty. He says, "after all my funeral, testamentary and all other expenses are paid, and whatever legacies I may subsequently make, I give and bequeath the residue of my property to the following charitable societies," and then he enumerates seven. Certainly, at first sight, it would appear that, when he talks of what is to remain after payment of his funeral, testamentary, and all other expenses, and of whatever legacies he might subsequently make, looking at it without any view to the context, the words "residue of my property" would include all his real and personal estate. But it is well settled that general words, like the word "property," "all my effects," &c., although in their ordinary acceptation they have a wide and general meaning, and will include property of every description, may yet by the context be cut down so as to have a less extensive interpretation. The question is whether there is anything in the context of this instrument, consisting of a will and codicil, sufficient to cut down the general meaning of the word "property;" and I am of opinion that there is. I have already alluded to that remarkable clause in which, for the benefit of charity—for it could be for no other intelligible purpose—he declared that his mixed personal estate which the charities could not take should be first applied to his

legatees who were not charitable legatees. The effect of that would be to leave a considerably increased fund out of which the charitable legacies could by law be paid. This is plain also from the fact that there is a direction that his mixed personal estate, so far as the same should extend, should be so applied. That indicates a doubt in the testator's mind whether that part of his personal estate which was not pure personalty would be quite sufficient for the purpose. There is, therefore, a plain indication of this—that the testator knew there was one kind of property which he could by law give to charity, and another kind of property which he could not He has given the general residue of his property to no one besides the seven charities; and if I am to decide the question whether the word "property" was used so as to include a gift to the charities of property which the testator knew they could not take, that is a construction which I am forbidden to adopt, because the testator shows that he knew there was property which the charities could not take. If the context plainly shows that he knew that some of the property was such as the charities could not take, there is enough in the context to cut down the word "property" to such property as the testator knew the charities could take. Therefore, upon the construction of the whole will, I think the word "property" must be cut down to mean pure personalty only. I ought, however, to remark upon the cases which have been cited at the bar. The most remarkable of these cases is that of *The Philanthropic Society* v. *Kemp* (*a*), and *Sturge* v. *Dimsdale* (*b*), before Lord Langdale, and which Lord Chancellor Truro, in the case of *Robinson* v. *Geldard* (*c*), declined to follow. There cannot be a doubt that these are decisions which show that the Court will give effect to the slightest doubt

(*a*) 4 Beav. 581. (*b*) 6 Beav. 462. (*c*) 3 M. & G. 735.

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in favour of the application of the Mortmain law, so as to avoid a gift by means of its application. There have been Judges of this Court, and Lord Langdale was one of them, who pressed to the utmost the doctrine which led to the defeat of a gift of property by means of the application of the Mortmain law. Lord Langdale was one of those Judges who, acting upon a view which Lord Truro, I think, very wisely declined to follow, pressed the construction of the Statutes of Mortmain in a way most unfavourable to charitable bequests. Text writers have objected to that principle of construction, but it is impossible for me to say that I should not have been bound by it, if the remarks of Lord Chancellor Truro, in the case of *Robinson* v. *Geldard* had not relieved me from much difficulty. I think that in the case of a gift of charity, as of all other gifts, where a certain object of the testator's bounty is named, and where the intention plainly is that charities should take a part of his estate, the same principle which should be adopted in the case of a gift to everybody else is to be applied to the case of a charity, and it is not right to strain the interpretation in order to defeat the bounty of the testator because the gift is one to a charity. On the contrary, I think it is the duty of the Court, in construing wills, and seeing to the due administration of the estate of the testator, to act upon exactly the same principle of construction towards charitable legacies as towards other legacies which are given not for charitable purposes; and that, when it sees what the intention of the testator was, to give effect to that intention as clearly as the Court can collect it from the language of the will. I have not a doubt that when the testator used the word "property" in the codicil he knew that charities could not take the mixed personal estate, which he therefore directed to be first applied, as far as the same would extend, towards payment of such legacies as were not

given to charitable institutions; and when he bequeathed the residue of his property to seven charities, he meant the residue of that property which charities could, according to law of the Court, legitimately take.

The declarations were as follows:—That the direction in the will extended to the general legacies in the codicil, and that the general legacies in both will and codicils were payable in full out of the impure personalty; that the residue of the impure personalty was undisposed of and went to the next of kin; that the charitable legacies given by the will and codicils were payable in full out of the pure personalty, and that the residue of the pure personalty went to the seven charities. The costs of the plaintiffs and of the Attorney-General were ordered to be taxed as between solicitor and client, those of the plaintiffs to include costs, charges and expenses properly incurred; the other costs (except those of Henry Hine) to be taxed as between party and party; and it was declared, following *Eyre* v. *Marsden*, that such costs, charges and expenses ought to be borne by the pure personalty and the impure personalty rateably, in proportion to the values of the amounts of the pure and impure personalty.

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Novem. 11*th* 12*th* & 13*th*.

The owners of contiguous estates, who were tenants in common of the mines beneath, held equally entitled to the landing rent paid on foreign coal, raised through a shaft which had been constructed by a lessee of the mines, but which opened into the separate estate of one of the owners.

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THIS bill was filed by Assheton Clegg against Abraham Clegg, Alice Clegg, and Thomas Butterworth, and it prayed—

1 and 2. That the defendants Abraham Clegg and Thomas Butterworth might be restrained from using the underground works and shaft except for the purpose of getting, raising, or landing any coal except from under the Bent Grange and Westwood and Highfield Estates.

3. That the plaintiff might have liberty to inspect the mines.

4. That an inquiry might be directed to ascertain what ought to be paid to the plaintiff by the defendant Butterworth for coal gotten anywhere but under the said estates, the plaintiff nevertheless submitting to accept that rate already agreed by Butterworth to be paid to the other defendants.

5. That an account might be taken of tie and quarterage rents due to the plaintiff, and, if necessary, what was due to the defendants Abraham and Alice Clegg in respect of the Bent Grange and Westwood Mines, on the footing of Butterworth's tenancy under the memorandum of November, 1846, and that he might be decreed to pay what was found due.

6. That, if necessary, the said agreement might be specifically performed, and that it might be declared that the said Butterworth could not object to the title, and that if necessary a lease might be settled.

8. That, if necessary, an account might be taken of all sums received by the defendants Abraham and Alice Clegg from the defendant Butterworth.

9. That, if necessary, a receiver be might appointed.

10. That the damages occasioned by the breaches and wrongful acts of the defendants might be made good to the plaintiff.

Abraham Clegg the elder, formerly of Bent Grange, Oldham, Lancashire, the grandfather of the plaintiff and the defendant Abraham Clegg, and the great grandfather of Alice Clegg, was, at the date of his will, and at his death, seized in fee-simple of two estates in Oldham, which adjoined each other, one of which was and is called the Bent Grange, and the other the Lane End Estate, but now called Westwood Estate, and also of the mines of coal and other mines lying underneath the same.

Abraham Clegg duly made and executed his will dated the 6th of February, 1800, and thereby devised his Bent Grange Estate, except all mines of coal lying thereunder, to his son Abraham Clegg the younger in fee-simple; and he devised the Westwood Estate, by the name of the Lane End Estate, except all mines of coal lying thereunder, to his son William Clegg in fee-simple. He also devised his coal mines lying underneath his said Bent Grange and Westwood Estates unto and to the use of his said sons Abraham Clegg and William Clegg in fee-simple, nevertheless as to one moiety in trust for his said son Abraham Clegg in fee-simple, and as to the other moiety in trust for his said son William Clegg in fee-simple.

The testator died in March, 1800.

William Clegg, by his will, dated the 23rd of May, 1812, being seized of the Westwood Estate, except the mine of the Midfeathers Estate and of the mines beneath the Bent Grange and Westwood Estates, devised the same to John Beswick, his widow Catherine Clegg, Thomas Hollins, and the plaintiff, upon trust for sale, &c. He died on the 31st of May, 1821.

Abraham Clegg the younger, by his will, dated the 26th of December, 1822, and a codicil dated the 24th of

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March, 1825, devised his Bent Grange Estate, and also his undivided moiety of the mines lying under the Bent Grange and Westwood Estates, as to one moiety thereof to his son, the defendant, Abraham Clegg, in fee-simple, and as to the other moiety to his son John Clegg for life, and after his decease, in case there should be only one child of him, John Clegg, to the use of such child in fee-simple; and in default of all issue of the said John Clegg, or if there should be such, and all of them should die without leaving lawful issue, then he devised the said last-mentioned moiety to his said son, the defendant, Abraham Clegg, in fee-simple.

Abraham Clegg the younger died in 1826.

The principal mine lying under the Bent Grange and Westwood Estates was called the Royley or Ryley Mine, and was situate at about 280 yards from the surface. But there were other mines much nearer the surface, called the Hollingworth Mine, the Two Mines Mine, and the Neddy Mine. All these mines extended under the estates adjoining Bent Grange and Westwood Estates, and all the mines which lay above the Royley or Riley Mine were known by the general description of the Top Mines.

In the lifetime of Abraham Clegg the elder, and before the date of the will, a shaft had been sunk by him or by his predecessors in title in the Bent Grange Estate for the purpose of working the coal beneath that and the Westwood Estates; and by means of this shaft some portions of the Top Mines were worked by the testator himself before the date and execution of Abraham Clegg the elder's will. The works were suspended after his death for a considerable time.

In or about the beginning of 1839 a verbal agreement was entered into between the trustees of William Clegg's will, the defendant Abraham Clegg, and John Clegg on the one part, and one James Radley on the other part,

under which Radley, as tenant to the other parties to the agreement, resumed the working of the Top Mines under the Bent Grange and Westwood Estates by means of the shaft situate in the Bent Grange Estate, and paid rent to the said other parties for the coal gotten by him therefrom.

About the end of the year 1840 James Radley sold his interest in the plant by which he was then working the said Top Mines to the defendant James Butterworth, and on the occasion of this sale a verbal agreement was entered into between the trustees of William Clegg and Abraham Clegg and John Clegg of the one part, and the defendant, Thomas Butterworth, with the privity of the said James Radley of the other part, whereby Radley relinquished the possession of the Top Mines and the plant to the defendant Butterworth, who became tenant in the place of the said James Radley, and paid rent.

After the defendant Butterworth had been for some time working the Top Mines, about the year 1840, he proposed to the parties interested to work the Royley or Riley Mine by means of a new and independent shaft, which he proposed to sink in a meadow called the East Great Meadow, forming part of the Westwood Estate, which was at that time in the occupation of one William Higinbottom as tenant to the trustees of William Clegg; and at the time when the negotiations which resulted in the below-mentioned memorandum of November, 1846, took place, the defendant Butterworth had begun to sink a new shaft as he had proposed.

The bill alleged that at the time of the negotiations which led to the prepartion of the agreement of November, 1846, the defendant and Butterworth had commenced sinking a shaft in the East Great Meadows with a view to working the Royley Mine beneath the Bent Grange and Westwood Estates, which it was thereby stipulated should be finished in two years. The bill

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alleged that shortly before November, 1846, negotiations took place between the trustees of William Clegg, the defendant, Abraham Clegg, and John Clegg, on the one part, and Thomas Butterworth of the other part, as to modifications to be made of the terms of Butterworth's tenancy of the Top Mines underneath the Bent Grange and Westwood Estates, and to an extension of his tenancy to the Royley Mine underneath the same estates, and generally with reference to the grant to him of many privileges by the other parties to the agreement, and as to the manner of exercising such privileges contemporaneously with such negotiations. Other negotiations took place between the trustees of William Clegg, on the one part, and Thomas Butterworth of the other part, for the letting to Butterworth by the said trustees of the East Great Meadow, forming part of the Westwood Estate, on the expiration of Higinbottom's term.

The bill alleged that after the terms had been discussed, considered, and agreed to between and by the parties interested therein respectively in November, 1846, a memorandum in writing embodying the agreed terms was prepared by the plaintiff, and shown to the other parties interested, who approved of, assented, and agreed to it, and which was in the following terms:—

23. The aforesaid memorandum of November, 1846, was in the words and figures following, that is to say:—

Proposed conditions for letting the coal under the joint estate.

(November, /46)

A conditional agreement for a lease of fifteen years from the 1st of January next, of the mine called the Riley Mine, the condition to be that the shaft now being sunk shall be finished to the said mine within two years from that date ——

"the tie rent for such mine to be 300*l.* per annum, and quarterage one-sixth of the selling price, payable quarterly ——

"all other mines above the said Riley Mine to be leased for a term of nine years from the 1st of January next, at a tie rent of 150*l.* per annum, and a quarterage of one-seventh as respects the Hollingworth, the Two Mines, and the Neddy, but the quarterage of any other such top mines to be one-sixth —— If the lessee from any cause fail to prosecute and complete the sinking of the * * said shaft to the Riley Mine within the period aforesaid, the lessors shall have power to annul and determine the last-mentioned lease of the Top Mines, on giving the lessee twelve months' notice in writing, all quarterage and tie rent to be due and payable in two separate moieties, one to J. & A. C., the other to the executors of W. C., with full power reserved to each to enforce payment of the same and performance of covenants —— by distraint or otherwise, also by themselves or their agents to examine the accounts and the working of the mines ——

"rent to be paid to the joint estate for landing coal, either from the Highfield or Midfeathers Estate at per quarter, no other coal to be landed without consent of lessors

"restrictions as to power to sink shaft and make roads;
"ditto as to getting coals under certain buildings ——

a map or underground plan of the workings to be made, showing the breadth of mine or mines already cleared, and all future gettings to be marked thereon as the same shall occur, at certain fixed periods to be named, such map or plan to be made at the joint expenses of the lessors and lessee.

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(The underneath is a separate agreement with executors W. C.)

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The meadow or field now in the possession of W. Higinbottom to be rented by T. Butterworth at the end of his term at £ per statute acre, and the fences on the north and west sides thereof to be kept in repair (*a*) by him; but a right of road shall be reserved to the executors over the same, through an opening to be left in the embankment now being made for the purpose of occupying the adjoining meadow, at present also in occupation of the said W. Higinbottom, power being reserved to the said executors to let any part of the said land for building (*b*) upon, or for making bricks, and a communication through such embankment retained for that purpose—the said executors abating from the rent of such field in proportion to the land so taken——

"all such general covenants as are usually inserted in coal leases and other special covenants shall be introduced in the agreement, and all arrears of quarterage and accounts settled on signing the same.

The bill alleged that, after the approval of the said agreement, Butterworth proceeded with the construction of the proposed new shaft in East Great Meadow, until he reached the depth of forty-five yards, after which he changed his plan for reaching the Royley Mine, and proposed, in lieu thereof, an extension or deepening of the shaft already sunk in the Bent Grange Estate, and then

(*a*) Across this part of the agreement were these words—"N.B.—This constitutes a separate agreement between the executors of W. C. and Thos. Butterworth."

(*b*) Across this part of the agreement were these words—"A separate agreement between executors of W. C. and T. B."

actually used in working the Top Mines. This plan was acquiesced in by all the parties interested, and Butterworth thereupon abandoned the further sinking of the new shaft in East Great Meadow, and proceeded to deepen the original shaft on the Bent Grange Estate until he reached the Royley Mine.

On the 23rd of June, 1848, the former tenancy having expired, an agreement of lease of the East Great Meadow was made between the plaintiff and the defendant Butterworth, and on this occasion the provisions of the memorandum of November, 1846, which related thereto, were struck out, and the words above-mentioned were written across. The bill alleged that one of the principal objects of the trustees of William Clegg in assenting to the tenancy in the memorandum of November, 1846, was the immediate getting of the coal under the Westwood Estate, in order that the surface lands might be made available for building.

The bill alleged that, in November, 1846, the mines beneath the Highfield Estate belonged exclusively to Abraham Clegg, and the coal under Midfeathers Estate belonged exclusively to the trustees of William Clegg. The bill alleged that, at the date of the memorandum it was considered that the coal beneath Highfield and Midfeathers Estates might be advantageously gathered by making use of the underground works and shaft; and it was also contemplated as probable that the owners of the mines would or might during the terms let the mines to be worked by Butterworth.

The bill alleged that the terms of the tenancy under the memorandum, by which provision was expressed to be made for payment of quarterage rent in respect of coal landed from the Highfield or Midfeathers Estates, were adopted in order to secure that, in case of letting, the mines, or either of them under the last-mentioned estates, to Butterworth, and of his making use of the under-

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ground works and shaft belonging to the Bent Grange and Westwood Mines, a due compensation or allowance in the nature of landing quarterage should be made to the joint owners of the Bent Grange and Westwood Mines for the use made of their joint property in getting in of the other mines, in which they were separately and not jointly interested.

The bill also averred that the provision in the memorandum, that no other coal except that mentioned should be landed without the consent of the lessors was adopted to prevent the injury that might be sustained by the owners of the Bent Grange and Westwood, by other coal being brought into competition with their produce, and also to prevent the working of their mines being delayed, and also, in case the adjoining mines should be worked, to secure a proper compensation by way of landing rent.

The bill alleged that the defendant Butterworth afterwards became tenant by agreement of several adjoining mines, and had since raised and landed the coal of such adjoining proprietors by means of the shaft of the Bent Grange and Westwood Mines, and that no means of access existed to the mines so leased or purchased by the defendant Butterworth, or to the mines under the Bent Grange and Westwood Estates, except by the underground works and shaft belonging to the Bent Grange and Westwood Estates. The plaintiff alleged that the defendant Butterworth had not paid the proper quarterages and rents which the plaintiff was entitled to receive in respect of the use of the shaft and works, although he had made some payments on account thereof to the plaintiff. The plaintiff also alleged that he had called upon the defendant Butterworth to desist from using the shaft for the purpose of raising the coal from the estates of adjoining owners, but he refused to comply with such request, and was now getting and landing coal thereby without accounting to the plaintiff.

The bill also alleged that from July, 1852, to January, 1859, that Butterworth had got less than seven acres of coal from the Bent Grange and Westwood Mines, and during the same period had got twenty-four acres from the adjoining mines, besides a considerable acreage not known to the plaintiff out of the Highfield Estate. The bill alleged that no means of access existed to any of the mines, except through the Bent Grange and Westwood shaft.

The bill alleged that Butterworth, under some arrangement, for several years paid to Abraham Clegg 15*l.* a year by way of compensation for the use of so much of the surface of the Bent Grange Estate as was required by him, in which the plaintiff did not claim to participate; but the bill further alleged that Butterworth had made a further arrangement with Abraham Clegg, with the particulars of which the plaintiff was unacquainted, under which Butterworth paid to Abraham Clegg large sums of money by way of landing quarterage upon the coals gotten out of the Highfield Estate and for the use of the shaft, in which the plaintiff claimed to be interested, commensurately with his interest as trustee in the joint property. The bill also alleged that a further arrangement had been made between Abraham Clegg and Alice of the one part, and Butterworth of the other part, under which Butterworth had paid large sums by way of landing quarterage on coal gotten from the mines of adjoining proprietors, in which the plaintiff claimed to participate.

The bill then alleged that application had been made by the plaintiff to Butterworth for payment to him of quarterage rent in respect of the Bent Grange and Westwood Mines, but he had not paid such amount, though he had paid sums on account. That he had also applied to him to desist from raising other coal through the shaft than from the Bent Grange, Westwood, and Highfield Estates, but that he had refused to comply with such request.

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The defendants alleged that in the latter part of 1846, another meeting took place at Oldham, where it was verbally agreed that, as to the Royley Mine, the original agreement should be varied, the variation being that, instead of a per centage on the selling price, the defendant Butterworth should pay 280*l.* per acre (Lancashire) by measurement, and that the tie rent should be 300*l.* instead of 200*l.*

The plaintiff denied this verbal arrangements.

On the 14th of January, 1861, the cause came on to be heard, but was directed to stand over, with liberty to the plaintiff to plea a supplemental bill as to the alleged agreements which had been done.

Argument.

Mr. *Malins* and Mr. *Little* appeared for the plaintiff, and contended that the plaintiff was entitled to participate in the landing rent.

Mr. *Bacon* and Mr. *Osborne* appeared for Abraham Clegg, and cited the case of *The Earl of Cardigan* v. *Armitage*(*a*), and *Bowser* v. *Maclean* (*b*).

Mr. *Green* and Mr. *G. L. Russell* for the defendant Butterworth.

Mr. *Taylor* appeared for Alice Clegg, an infant.

The arguments on both occasions lasted several days, and turned mainly on the validity of the agreements mentioned in the pleadings, none of which in the result were held proved. There was an immense mass of evidence.

The VICE-CHANCELLOR :—

Judgment.

This case has been embarrassed and confused by a mass

(*a*) 2 B. & C. 197-207. (*b*) Not reported.

of evidence which affords very little assistance for the decision of what is the real question between the parties. So far as the plaintiff's bill is filed for the specific performance of the alleged agreement of November, 1846, his case has entirely failed. He has not shown, as to the landing rent derived from the landing of foreign coal, that there was any concluded agreement in the month of November, 1846, according to the memorandum which he states. As to the agreement which is set up by the defendants Abraham Clegg and Butterworth, as a parol agreement, said to have been made in the month of October, 1846, so far as any such parol agreement relates to this question of landing rent for foreign coal, the case fails as completely as it does as to the other. Therefore, the Court is bound, I think, to consider the extent to which the litigation has gone, and to make a declaration to that effect by its decree.

The great question in dispute is the right of the plaintiff to participate in the profits derived from landing coals of other coalowners through the shaft sunk on the defendant's land. That shaft was sunk for the purpose of working those beds of coal, of which both the plaintiff and the defendant are tenants in common in undivided moieties. The plaintiff insists on a right of property in this shaft, sufficient to entitle him to participate in any profit made by the use of it and the works connected with it, for the landing and raising of coal of other coalowners. The defendant, on the other hand, insists that this is a shaft which pierces his ground—is made upon ground which is his separate property, as to the surface of the ground, and as to everything connected with it, except the beds of coal, and that it is his separate property, of which he is tenant in severalty in fee-simple. When I speak of the defendant Abraham Clegg, I wish to be understood as speaking of that interest which he has as tenant in common with Alice Clegg of the

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land and everything pertaining to it, except the beds of coal.

So far as I know, the question is entirely new. The plaintiff and defendant are tenants in common in undivided moieties of the coals underneath both estates, under the Bent Grange Estate, upon which this shaft is sunk, and under the Westwood Estate, which adjoins. The fact that this shaft was constructed for the purpose of working the coal of which both plaintiff and defendant are tenants in common in undivided moieties, is not disputed. It was sunk by Butterworth, in the character of tenant of both plaintiff and defendant. It is difficult to understand on what ground a work constructed by the tenant of two persons who are tenants in common in undivided moieties, with a view to the benefit of both the tenants in common, can be considered as the exclusive property of either. It is said that it is the exclusive property of Abraham Clegg and his co-defendant, because they are the exclusive owners of the land on which the shaft was sunk. But this is not a question about the ownership of the land. It is a question about the ownership of the shaft; and if the shaft was made at the expense of both, it is not easy to see how it can be considered as the exclusive property of the one who is owner of the soil. It is indeed said that it was made, not at the expense of both, but at the expense of the tenant. When a tenant constructs a work of that kind, it is with reference to his interest and to the interest of his landlord; and the expenditure of the tenant is an expenditure which it is impossible to treat as the expenditure of the tenant as an individual, giving him an individual right to that property which has been constructed by the expenditure of his money, because his rent payable to both is fixed with reference to that expenditure. The purpose for which the work has been constructed, and the circumstance that that purpose is a purpose beneficial to

both the tenants in common seem to me, upon a very intelligible principle, to exclude any exclusive right in the owner of the land, to the use of that which was constructed not at his expense, not by him at all, but by a person who, in constructing it, was acting on behalf and under the authority of both.

No case has been cited on the subject, except that of *The Earl of Cardigan* v. *Armitage*, a case which has not the remotest application to the case of a tenant in common. There was no question there about anything done upon an expenditure with a view to the benefit of both. The only question in that case was, upon the construction of an exception in a deed of grant, or in some document of title, which made it necessary for the Court to consider what the rights were of a person who, being entitled to property under a grant, had that property in a useless state, unless with an implied right of access to it. Therefore, in disposing of this question, I am without the assistance of any authority whatever. It seems to me that, in the absence of authority, I am bound to decide it upon the principle that what is done by the tenant of two persons who have a joint interest in property, with a view to the benefit of both, although done on the property of one, does not leave in that one any exclusive right to the use of it for his own benefit, so as not to entitle the person who bore his share of the burden to his share of the benefit of the use of the work thus constructed, to whatever purpose of advantage it may be used.

If this be the correct view, the Court must declare that, having regard to the circumstances under which, and the purposes for which the shaft and work which, in the year 1850, were commenced, and completed in the year 1852, the late Abraham Clegg had not, and Alice Clegg had not, and have not now, any exclusive right to the use thereof, and were not, nor was either of them entitled to use, or to permit the defendant Butterworth

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or any other person to use, the said shaft and work for the purpose of landing coals from the mines of other coalowners for their own benefit and profit, to the exclusion of the plaintiff; but that the plaintiff is entitled to an equal half part or share in all such benefit and profit. There must be an account of all sums received by the late defendant Abraham Clegg, or his representatives, or by Alice Clegg, or by any person or persons by their or either of their order, or for their or either of their use, in respect of landing rent or otherwise, for landing through the said shaft coals from the mines of other coalowners, and of what remains due to the plaintiff, and from whom, in respect of plaintiff's share of such landing rent. Also an account of all sums due to the plaintiff in respect of rent and profit for the working of the coal under the Bent Grange and Westwood Estate, from the 1st of January, 1852. As to the costs of the suit, there has been failure of the case of the plaintiffs, so far as relates to the agreement of 1846. There has been failure on the part of the defendants, both of them, so far as relates to the agreement which they set up, as made in October, 1840. There has been a great mass of evidence on both sides, which has occasioned a great deal of expense, and produced no benefit to either. The case is one, therefore, of partial success and partial failure.

As to the agreement: Declare that it does not appear to the Court that there is any valid agreement subsisting between the plaintiffs and the defendants, or either of them, as to working or landing the coal of other coalowners, to the specific performance of which either the plaintiff or any of the defendants is entitled, according to the alleged parol agreement of the month of October, 1840, as stated in the answer of the defendants Abraham Clegg and Thomas Butterworth. Further consideration will be reserved; no costs to either party up to the hearing.

Re HOLMES' ESTATE.
WOODWARD *v.* HUMPAGE.
BEVAN'S CASE.

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Nov. 19*th*, 20*th*, & 21*st*.

Claim by a solicitor against a testator's (his client's) estate for a sum of money advanced to the client on loan, but which, in fact, formed the proceeds of a bond debt due to the testator, and received by the solicitor at the client's direction, and which the solicitor alleged the client had given him, by an agreement prepared by such solicitor at the client's expense, and containing no recital of intended bounty. —Disallowed.

THIS cause came on for further consideration, and on a summons to vary the chief client's certificate, whereby he allowed the sum of 2062*l.* 13*s.* 9*d.* to Mr. W. Bevan.

This suit was instituted by two infants by summons for the administration of the estate of Mr. John Holmes, late of Bristol.

By his will, dated the 19th November, 1859, the testator gave several pecuniary legacies, and subject thereto gave and devised all his real and personal estate to Edward Humpage and E. T. Inskip upon trust for sale, and he directed his two trustees to stand possessed of the proceeds upon trust for the benefit of the infant plaintiffs, Elizabeth Holmes Woodward and Augustus Henry Woodward. The testator died on the 23rd May, 1860, and his will was proved by his executors in the following year.

On the hearing of the summons in December, 1860, it appeared that Humpage, one of the executors, had filed a bill against Inskip, the other executor, and the infants, subsequently to the taking out of the summons. The chief clerk, however, made an order on the summons and disregarded the bill, which, however, was proceeded with, and interrogatories filed, to which Inskip duly put in his answer, and the cause was then brought on on notice of motion for a decree, which was served on the defendants on the 31st June, 1861. His Honour stayed all proceedings in the suit of *Humpage* v. *Inskip*, and directed certain inquiries in this suit, which were prosecuted at chambers. The usual advertisements were issued for creditors, under which four claims were made.

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The first was a claim by Messrs. Bevan and Girling for costs, which was not disputed. The other claims were for a sum of 2062*l.* 13*s.* 9*d.* by Mr. W. Bevan, and for a sum of 2000*l.*, and about 300*l.* by Mr. Inskip, all of which the chief clerk allowed. The present summons was to vary the certificate so far as it allowed the last three sums.

It appeared that Mr. Bevan, for several years prior to 1856, had been employed by the testator as his solicitor, and on the 9th February, 1856, received from the testator the following letter:—

"West Park, Cotham, February 9, 1856.

"Dear Sir,—As I mentioned to you several years since, I am, as I then was, very desirous of being, for many reasons, my own executor, and doing what I could in my own lifetime, and in such manner as should be pleasing to myself. I have, therefore, to request that you will prepare the necessary deeds for transferring John Russell's mortgage to the Rev. C. H. Spurgeon, and others to be named, for the purpose of enabling him to build a chapel, substantial, but not ornamental, in such localities as they (the trustees to be named) shall think fit, and also to prepare the necessary deeds for transferring the mortgages of Daniel Horwood and George Rogers to my friend, Mr. Edward Rogers Inskip, for his own use and benefit absolutely; also I wish to assign to yourself the bond of Mr. Francis Woodward, which I have forwarded to you by Mr. Inskip.

"I am, respectfully yours,

"JOHN HOLMES."

The bond referred to in the above letter was the bond of a Mr. Woodward for securing 2000*l.* and interest to the testator. It was brought and delivered to Mr. Bevan by Mr. Inskip, who was then acting as the confidential friend and adviser of the testator, together with the above-mentioned letter, which was written by Mr. Inskip him-

self, and signed by the testator. Mr. Bevan accordingly prepared a deed for transferring the bond to himself. The assignment, which was in blank as to date, recited that the testator was "desirous of transferring all his estate and interest in the said bond, and the principal and interest thereby secured, unto the said William Bevan." It then proceeded to assign the bond for a nominal consideration "unto the said William Bevan, his executors, administrators, and assigns absolutely for ever." The deed contained also a power of attorney, enabling the said William Bevan to sue on the said bond in the name of the testator, but it contained no recital of any intended bounty in favour of Bevan.

The mortgage referred to in the letter as Russell's mortgage was for a sum of 10,000*l.*, and which was not in fact transferred, in consequence of some legal difficulties, in consequence of which the testator gave Mr. Spurgeon 5000*l.* The mortgages of Horwood and Rogers were for 2000*l.* and 3500*l.*, with interest, for transferring which to Inskip Mr. Bevan, by the testator's direction, prepared the necessary deeds. Mr. Bevan, in his affidavit, described what took place as follows:—

"When the said deeds were prepared, a day was appointed for completing the transaction at the testator's house, and on the 16th day of February, 1856, I repaired to the testator's house with the said deeds ready for execution by him. There were present, besides the testator and myself, Mr. Inskip and Mr. Power, an accountant of high standing and respectability in the city of Bristol, and after the said instruments had been fully read over to the said John Holmes and approved of by him, they were duly executed by him. I believe that Mr. Inskip has had the full benefit of the 5500*l.* assigned to him. Upon this occasion the said John Holmes expressed his desire that I would enforce the bond against Francis Woodward, who had, as I understood, contended that he was not liable to pay the

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debt. When the assignment of the said bond to me was executed, Mr. Inskip, in the presence and hearing of the said John Holmes, stated that the assignment of the said bond was an absolute and unconditional gift to me from the said John Holmes."

Mr. Bevan, by the testator's direction, applied to Mr. Woodward, the husband of the testator's niece, for payment of the amount secured by the bond for 2000*l.*, in reply to which Mr. Woodward requested time, alleging that he had understood that the money was not to be required, but that it was to go to his children at the testator's death. The testator, it was alleged, was very angry at Mr. Woodward stating that he was not ready to pay the 2000*l.*, and directed Mr. Bevan to issue a writ against him, which he accordingly did. But some time was given him, and ultimately Mr. Woodward, on the 27th of August, 1856, paid an instalment of 1000*l.* to Mr. Bevan. Shortly afterwards Mr. Woodward was killed by a fall from his horse. After his death Mr. Bevan received from his executor a second instalment of 500*l.* on the 16th October, 1856, and lastly the balance of 562*l.* on the 23rd of January, 1857, being the amount of principal and interest.

The alleged advance of the money by Mr. Bevan to the testator was stated by Mr. Bevan in his affidavit, as follows:—He stated that between the 27th of August, 1856, and the 23rd of January, 1857, the testator had occasion for a sum of 2000*l.* He had called in Russell's mortgage for 10,000*l.*, but some delay having occurred in payment, he was inconvenienced for want of the money. Mr. Bevan said that these circumstances were mentioned to him by Mr. Inskip, who said that as he (deponent) had received 2000*l.* by way of gift from the testator, he (Mr. Bevan) ought to accommodate the testator by lending him that money; and Mr. Inskip further promised the deponent, on the testator's behalf, that the loan should be

repaid to him out of the 10,000*l.* when the mortgage debt of that amount was recovered. Being thus informed by Mr. Inskip, and relying on his promise of repayment, Mr. Bevan said, "I handed over to the testator the money recovered from Francis Woodward and his executor." Mr. Bevan further alleged he had made frequent applications to Mr. Inskip to procure the repayment of the money before the testator's death, but in vain; and he now made this claim.

On cross-examination, Mr. Bevan said that, when Mr. Inskip brought the letter, he asked him if the testator had been kind enough to give the bond to him, and he (Inskip) answered, "Yes; he intends it to be for your benefit." After the execution of the assignments, the testator said to witness, with reference to Woodward's bond, that Woodward had behaved very badly, had told falsehoods, and had said that the money for which the bond was given had been given to him by the testator, and that he was never to repay it, but only to pay interest for it during his life; and the testator said he therefore gave witness the bond, upon the express condition that he should sue Woodward as soon as the notice expired, and make him pay it; and that he would have no communication with Woodward whatever, and should tell him that he had assigned the bond to witness, and that he had no interest whatever in it.

Inskip, by an affidavit made in the cause, dated the 8th of April, 1861, deposed that he was upon terms of great intimacy with the testator for many years previous to his death, and visited him almost every day; that he advised with him on all his affairs, and wrote his letters by his dictation, but that the letters were invariably signed by the testator. The testator frequently expressed to him his intention that Mr. Bevan should, amongst others, participate in his bounty, and on many occasions

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asked him (Inskip) in what way he thought Mr. Bevan would like it done. He (Inskip) wrote the letter of the 9th of February by the direction and under the dictation of the testator. When signed by the testator, it was delivered to the deponent, who took it, together with the mortgages and bond, and delivered them the next day to Mr. Bevan. With respect to what passed at the execution of the deeds, Inskip said that the testator, after such execution, expressed to him, the deponent, his wish that Mr. Bevan would immediately compel payment of the amount secured by the bond, and stated to Mr. Bevan that he had assigned the same to him as an absolute gift, whereupon Mr. Bevan thanked the testator for his kindness.

In the latter part of August, 1856, the testator informed the deponent that he was sadly in want of 2000*l.* for a special purpose, and desired him to ask Mr. Bevan to be so good as to let him, the testator, have the 1000*l.* which he, Mr. Bevan, had received from Francis Woodward; that he (Inskip) accordingly applied to Mr. Bevan, when he hesitated or declined to let the deponent have the money, and at the same time expressed a doubt whether the testator had really authorised him to ask for the money, and asked deponent why he did not let the testator have the 2000*l.* out of the mortgage which he had assigned to him, to which Inskip replied that it was ready money that the testator wanted. Deponent communicated the conversation which had so passed to the testator, who directed deponent to inform Mr. Bevan he should be repaid out of the 10,000*l.* secured by Russell's mortgage, whereupon Mr. Bevan on the 27th of August advanced the sum of 1000*l.*

That previous to applying to Mr. Bevan for the last-mentioned sum, Inksip suggested to the testator that he should give him (deponent) a letter requesting payment

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to him, and the testator thereupon dictated to the deponent the following letter:—

"West Park, Cotham, 8th January, 1857.

"Dear Sir,—I shall be obliged by your handing to Mr. Inksip a draft for the amount of the balance of principal and interest received from the late Mr. Woodward's bond, and he will give you a receipt on my behalf.

"Yours respectfully,

"JOHN HOLMES.

"To William Bevan, Esq."

Statement.

That at the time the testator signed the letter he said to deponent: "Don't show it to him (meaning Mr. Bevan) unless he requires it, for then I shall know if he has got faith in my word."

Mr. Bevan did not require the letter, and deponent never showed it to him.

That the 10,000*l.* was paid in December, 1858, and deponent expected that the testator would then repay Mr. Bevan, but he did not do so. The testator was then in a bad state of health, and deponent refrained as much as possible from troubling him with matters of business. In particular, though Mr. Bevan frequently requested him to apply for repayment, he (deponent) refrained from mentioning to him the said request, as from the peculiarly wayward mind and excessively irritable temper of the testator, he was afraid to mention the matter to him.

A great deal of evidence was adduced, which is commented on in his Honour's judgment.

Argument.

Mr. *Malins* and Mr. *Woodroffe*, for the motion to vary the chief clerk's certificate.

There was nothing in the deed of assignment to show that Mr. Bevan gave any consideration for the bond, or that there was intention on the part of the testator to

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Argument.

bestow his bounty on the assignee; but if so, Mr. Bevan was a mere trustee of the fund, and could not now claim to be repaid the money which he had paid to the true owner.

But even assuming an intended gift, the relation of solicitor and client, without the intervention of a disinterested adviser, created an incapacity on the part of the solicitor to receive the bounty. It was not necessary that there should have been fraud. In *Welles* v. *Middleton* (*a*), the marginal epitome was in these terms: "A court of equity, upon general principles of policy, will set aside any gift made by a client to an attorney during the time when the attorney has in hand the transaction of the client's affairs, without any proof of actual fraud."

[They cited *Moss* v. *Bainbrigge* (*b*).]

The VICE-CHANCELLOR.—I think it is for those who support the gift to show that it was proper.

Mr. *Greene* and Mr. *Hobhouse*, for Mr. Bevan.

The evidence proved clearly an intention on the part of the testator to benefit Mr. Bevan, who had been for many years his confidential solicitor. The testator was possessed of considerable property, and without any relations except those with whom he had quarrelled.

There was no rule of law or equity that a solicitor could not accept at present from his client. All that rule required was, that the influence which the law imputed to a solicitor over his client should be removed in one way or other. In all the cases in which the client's bounty to his solicitor had been set aside, it was because there was nothing to counteract the supposed influence of the solicitor. *Morgan* v. *Higgins* (*c*) *Holman* v.

(*a*) 1 Cox, 112.

(*b*) 18 Beav. 478; s. c. on appeal, 6 De G. M. & G. 292.

(*c*) *Antè*, vol. i. 270.

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Loynes (*a*) were cases of this kind. In the present case it was clear that Mr. Inksip, and not Mr. Bevan, was the confidential adviser of the testator. Mr. Bevan took no part in the transaction beyond acting as he was directed.

Argument.

In *Harris* v. *Tremenheere* (*b*), a bill to set aside certain leases, granted by a testator to his solicitor, no fraud having been proved, was dismissed with costs.

[*Gibson* v. *Jeyes* (*c*) and *Legh* v. *Legh* (*d*) were cited.]

THE VICE-CHANCELLOR:—

Judgment.

The question is, whether Mr. Bevan has proved that he is a creditor. The way in which he has undertaken to prove it is certainly very remarkable. The first step in his evidence is to prove a gift to him from the testator of the bond of Mr. Woodward. The second thing that he undertakes to prove is, that when he received the fruits of that gift, he lent them to the testator; that he became the testator's creditor for the subject-matter of the gift, because he gave it back to the testator in the shape of a loan. That is a very unusual transaction, and, considering that it is a transaction between solicitor and client, that circumstance creates a very great difficulty in the case of Mr. Bevan. The law of this Court as to gifts by a client to his solicitor, I think, is perfectly established. The principle is, that the relation of solicitor and client is one of such high confidence on the part of the client, that the solicitor is considered to have an amount of influence over the mind and action of his client, which, in the eye of this Court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift; but the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and

(*a*) 4 De G. M. & G. 270.
(*b*) 15 Ves. 34.
(*c*) 6 Ves. 266.
(*d*) 1 Bos. & Pul. 447.

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Judgment.

client. That relation is only looked at as creating the influence; and, as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if the influence of that relation is removed, there is no incapacity on the part of the solicitor to become the object of his client's bounty, and to be the recipient from his client of a gift which will be valid at law and in equity.

In the present case it is difficult to say what part of the evidence it is that goes to remove the influence of the relation. The evidence shows that this testator, a very aged man of recluse habits, had, in the year 1850, adopted a casual visitor who came to solicit the subscriptions of the testator to a charitable purpose. The testator, after several interviews, adopted that casual visitor as his most confidential agent, through whom he almost entirely transacted the whole of his business. That person is Mr. Inskip, who is usher of the Court of Bankruptcy in Bristol. Mr. Inskip, in the year 1850, became the confidential agent and manager of the testator. Mr. Bevan's counsel used that circumstance as showing that the degree of confidential relationship between Mr. Inskip and the testator rather went to diminish the amount of influence of Mr. Bevan over the testator's mind as his solicitor. Mr. Bevan is entitled to the benefit of the circumstance so far as it goes. Mr. Bevan remained the solicitor of the testator, conducting the business of his solicitorship through the intervention of Mr. Inskip principally; not, indeed, entirely, but so far principally as almost to exclude any personal intercourse between Mr. Bevan and the testator. Still the relation of solicitor and client subsisted. That it subsisted in the sense in which this Court looks upon it, as having an important effect upon the validity of a gift, is plain from this circumstance, that the alleged gift was by an instrument of assignment with a power of attorney, which was

prepared in Mr. Bevan's office by Mr. Bevan's partner, as solicitor of the testator, and the question arises whether or not the effect of that instrument, prepared in the office of the solicitor, who is the object of the gift, operates as a complete transfer of the property, so as to enable Mr. Bevan to take and retain it as a gift relieved from all that infirmity which attends the gift of a client to his solicitor. What is the evidence of the gift here? The most important part of it is, that very instrument which he prepared as the confidential solicitor of the testator, upon the testator's instructions, and for which, and for attending the testator to execute which, he has made the testator's estate pay, and charged the testator in his books. That is not a favourable circumstance. It amounts to this, that the testator not only made to his own solicitor a present of a bond, but the further gift of a sum of money to make that present effectual. The other evidence consists of the parol declarations of Mr. Bevan and of Mr. Inskip. But I find a remarkable discrepancy in their evidence. I cannot reconcile Mr. Bevan's account in his affidavit of the transaction at the time of the execution of the deed of assignment, when he says that the words of gift were pronounced by Mr. Inskip, with his statement upon his cross-examination that the words or gift were pronounced by the testator himself, and had been stated by the testator repeatedly. Parol evidence in matters of this kind, coming from two persons standing in the relation which these two persons did to the testator, is to be received and weighed with the most scrupulous accuracy, and to be dealt with as having its weight affected by the circumstances under which they both stood. No solicitor ought to be ignorant of this, that if he is going to receive a bounty from his testator, he must act with the greatest caution. The parol evidence is far from satisfactory to my mind. But, it is said, you have the deed; there is

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the assignment. The bond was put into the possession of Mr. Bevan, and the testator put his hand and seal to the deed of assignment, with the power of attorney. Nay, more—that deed of assignment was prepared upon written instructions of the testator. As to the written instructions of the testator, they are entirely equivocal as to the gift: the word "gift" does not appear. The words "that Mr. Bevan is to take them as a gift," or take them for his own use and benefit, are not inserted. In the same letter, where other property is clearly mentioned as being bestowed in the way of bounty and gift, the testator's language is perfectly clear. *Expressio unius est exclusio alterius.* Where in the same instrument he tells the solicitor that Mr. Inskip is to take certain property for his own use and benefit, but does not use the words "own use and benefit" in directing the assignment of the bond to Mr. Bevan, the letter cannot, on any principle of evidence, be held to be evidence of a gift, or of an intention to make a gift; or of instructions to prepare an instrument which shall operate in the way of bounty or gift, by the person who gives such instructions. If the instructions are not clear and unequivocal, what is to be said of a case where the solicitor, upon equivocal instructions, has prepared in his own office, by his own partner, a deed which he says is a deed assigning and transferring to him by way of bounty that gift of which he was simply desired to prepare the transfer?

In the deed itself another very great difficulty occurs. It contains words of assignment and grant, and it also contains words giving a power of attorney to sue for and recover the things given. In the words of grant, where an expression of the intention of bounty would be expected, there are no words importing that the property is assigned to Mr. Bevan, for his own use and benefit—none. That is the place where the words expressing the intention of bounty ought to have occurred. Nay, more,

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there should have been a clear recital of the intention of bounty, and nothing should have been left equivocal. But in the power to sue for and recover, the words "own use and benefit" slip in. That is not the way, in my opinion, in which a solicitor can proceed if he is to obtain a valid gift from his client. I am not aware of any case of this kind in which the Court has allowed the gift to prevail if there was a speck to cast a doubt upon the transaction. Looking at the principle of public policy and public utility upon which the Court acts in regard to gifts of this kind, evidence of doubt or inconsistency in the transaction seem to make it the duty of the Court to say that the gift cannot prevail under such circumstances. If the other circumstances of evidence are looked at, they seem to me to put it beyond a doubt that this is a case in which the Court must adhere to its strict rules as to the invalidity of the gift. The deed and the letter of the testator — the latter being equivocal — only prove a transfer of the legal interest. The mere transfer of the property without evidence of bounty would not operate *per se* as a gift. The trust must result to the testator, especially as the assignment is to a person in a confidential relation; and, without clear evidence of bounty, of course the gift must fail. When it is found in this gentleman's books (which are the books of himself and his partner) that contemporaneously there is an entry of this very transaction, and of the execution of this deed, and the testator is charged with the attendance for the execution of these three deeds, one of them being the alleged deed of gift to the solicitor, without the least mention that one of them is a deed of gift, it is quite plain that this was not entered or treated in the books as a deed of gift by the testator to the partner of the firm in whose books the entry occurs. That is the entry which must be taken on the evidence as being contemporaneous with the execution of the deed. But in the bill of costs

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paid out of this testator's estate there are entries in regard to this very bond which is said to have been assigned as a gift. There are entries and charges against the testator which would be most unjust and unrighteous if the bond had become the property, for his own benefit, of Mr. Bevan. The 16th of February is the date of the execution of the deed. The testator is charged with that.

Greene, Q.C.—Will your Honour excuse me? That entry is made in the book, but it was never charged against the testator. You do not find that in the bill of costs.

[The VICE-CHANCELLOR.—That makes the matter much worse. It was not charged in the bill of costs.]

Malins, Q.C.—No bill of costs was ever sent in at all until after this dispute had arisen.

THE VICE-CHANCELLOR:—

No bill of costs was sent in until after the testator's death, when claims were made against his estate. Mr. Bevan claims to be a creditor for a bill of costs, and a creditor for a loan of the money, which the testator's bounty has given to him. It would have been exceedingly inconvenient to have inserted in the bill of costs with which the testator was to be charged after his death any entry that would show that the other claim was in the least degree impeached, and the circumstance of keeping out that record of the transaction in the books, seems to me anything but favourable to the case of Mr. Bevan. But in the bill of costs, rendered after the testator's death, an entry did slip in, which, if the the thing had been well thought of, would have been dealt with like the other. According to the statement of Mr. Bevan, the bond had been given—there had been an incohate gift of the bond

on the 9th of February—a gift perfected by deed on the 16th of February, and after the gift was perfected by deed, the testator is made to pay for subsequent directions to call in that money, and for notices for it.

It is hardly necessary to go further into the case, but in the testator's book, in which he records his own transactions, he records the transaction which is said to be a gift in a way which shows that he did not treat it as a gift at all. He records the transaction in February as a simple transfer to his own attorney, whom he desired to call in the money: and by the subsequent entries in the testator's book, which are the testator's own declarations, subsequent, no doubt, but still clear evidence of what were the testator's thoughts and intentions about the money, it appears that he has it back from the man who said he had got it as a gift. All the entries about this, which is said to be a loan to the testator, are entries in order that the solicitor might sue the husband of his niece who was the obligor in the bond. He makes the solicitor pay back every instalment of money as soon as he gets it, within two or three days. These entries have an important bearing on the second part of the case, if the first had been established.

In order to make a valid gift, the first thing is, that the gift should be the clear, voluntary, well-understood act of the man who gives. This aged person, under the influence of Mr. Inskip, employing Mr. Bevan as his solicitor, records in his books in an accurate way that as to this bond he was dealing with Mr. Bevan as a person receiving moneys which, when received, he was bound to account for to him. The letter of the 8th of January, 1857, is a clear declaration of the testator to this effect. Whether it was communicated to Mr. Bevan or not is of no consequence, because the question is, what was the well-understood act of the mind of the testator when he made this transfer? That is shown by this, that when

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he hears that the money due on the bond which he had transferred to his attorney is received, he addresses him in these terms:—"Dear Sir,—I shall be obliged by your handing to Mr. Inskip a draft of the amount of the balance of principal and interest received from the late Mr. Woodward's bond, and he will give you a receipt on my behalf." All these things are inconsistent with the notion that the testator had, as a gift, and as a free and voluntary act of bounty, transferred this bond to Mr. Bevan for his own use and benefit, even if the infirmity of the relation between solicitor and client did not subsist, I am bound to hold that this debt must be expunged.

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An executor who was also the obligor of a bond for 2000*l.* found in testator's possession at the death, charged with the whole sum, notwithstanding his oath that he had only received 1500*l.*, it appearing that shortly before his death he had paid interest on the 2000*l.*, and that the testator, in a letter tied up with the will, mentioned the bond as a part of his assets.

INSKIP'S CASE (1) (*a*).

THE decree made in the suit directed an inquiry whether any, and what part of the sum of 2000*l.* secured by a bond, dated the 17th of October, 1856, had been repaid to the testator by the defendant, E. T. Inskip, or whether the same had been released by the testator to the obligor; and whether any, and what sum still remained due on the said bond to the testator's estate.

The chief clerk by his certificate found that only 1500*l.* had been advanced on the bond; that 500*l.* had been paid off by E. T. Inskip; and that the whole had been released, and that therefore nothing was due on the said bond. The plaintiffs now moved to vary the certificate on these points.

By a bond, dated the 17th of October, 1856, Edward Thomas Inksip became bound to the testator in the penal sum of 2000*l.*, but subject to a condition that such bond

(*a*) See *Antè* 337.

should become void on payment by the obligor, his heirs, executors, or administrators, to the testator within six months after demand by him of the sum of 2000*l.*, or so much thereof as should remain unpaid, and on payment by the said Edward Thomas Inskip in each year until such repayment on the first days of October and April in each year, or within fourteen days thereafter, of interest at the rate of 5*l.* per cent. The bond had a stamp of 1*l.* 5*s.* only, which it was admitted was insufficient to cover a larger sum than 1000*l.*

Statement.

Mr. Inksip, by his answer in the suit of *Humpage* v. *Inskip*, which had been made evidence in this suit, submitted that he was not liable to pay any part of the 2000*l.*, or, at any rate, not more than 1000*l.* part thereof. The answer stated that about the 10th of October, 1856, the testator directed him (Inskip) to obtain a bond stamp for 1000*l.*, as he wished to do something for the deponent's son. In pursuance of such direction he (Inskip) purchased the bond stamp, and handed it to the testator, and a few days after, the testator produced the stamp, and directed him to fill up the paper to which it was attached, so as to make it a bond for 2000*l.*, and return it to him. That he, knowing the testator to be extremely irritable and impatient of contradiction, filled up the paper and executed it as such bond as above mentioned, and returned it to the testator, who told the deponent to consider that he had to pay interest upon 2000*l.* so long only as he, the testator, lived. That about a week before the execution of the bond the testator handed to him a sum of 500*l.*, and about ten days afterwards a further sum of 500*l.*; and about the 24th of November then following the further sum of 500*l.*, making in the whole 1500*l.*; and he deposed that he had never received any part of the remaining sum of 500*l.*, which was the balance of the 2000*l.* expressed to be secured by the bond. He further alleged that on the 24th of November, 1856, the

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testator in the course of conversation told him that as he (the testator) had made a trial of his (Inskip's) faith in his word, and that he (Inskip) had given proof of such faith by executing the said bond without having received any part of the money secured by it, he intended to give up the said bond to the deponent, and would bring it down for that purpose from a drawer in his bedroom, where he kept it; but that the testator, who was a very large and heavy man, and unable to mount the stairs without inconvenience, did not actually do so, and that he (Inskip) continued to pay to the testator interest on the sum of 2000*l.* on the days mentioned in the bond.

The answer further alleged that on the 1st of April last Inskip paid to the testator interest due on that day, and the testator said to him: "You and I have not rode well lately" (thereby referring to some unpleasantness which had occurred between them), "and I think that I shall have back the 1500*l.* which I lent to you;" and deponent replied, "Very well, sir, you shall have it; but I suppose you don't want it immediately and all at once. You must kindly remember that it is so large a sum that I could not get it at once, but could get a portion of it in a few days." The testator rejoined: "No; but when will you let me have part of it, and how much?" and that he then said he would let the testator have 500*l.* in two or three days. Accordingly, on the 3rd or 4th of April, he took the testator 500*l.* in bank-notes; but before receiving such sum the testator said to him: "Well, what shall I do with this? I think I shall throw it behind the fire." That he thereupon entreated the testator not to do so, and the testator thereupon said: "You know I should not mind doing it; I have done so before." He said the testator, in making the last-mentioned remark, referred to an occasion when he (testator) threw a roll of bank-notes amounting to 10,000*l.* on the back of the fire, though not, as he believed, with the real intention that

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INSKIP'S CASE (1).

they should be burnt, on which occasion he (Inskip) rescued the notes from the fire, or rather from the coals on the back of the fire, on which the notes were thrown. That the testator did not throw the notes on the fire, and said: "Well, I see you have the intention to pay me; and as I have made trial of your faith, take your money and put it in your pocket; I shall give you up the bond;" and that accordingly he (Inskip) took the notes for 500*l.* and put them in his pocket, and retained them for his own use. The testator did not, however, deliver the bond to him.

Statement.

The answer further alleged that the testator was an aged man, unmarried, and of eccentric habits, who had quarrelled with his relatives; that he (Inskip) had enjoyed his utmost confidence and intimacy, and he had left him the management, to a great extent, of his pecuniary affairs. Under these circumstances he submitted the testator had forgiven him the sum of 1500*l.*, which he had advanced, or, at all events, that he was not liable for more than 1500*l.* Together with the testator's will, a letter was found of even date with the will addressed to his executors, which specified as part of his assets 2000*l.* secured by bond of Thomas Inskip.

The testator's cash-book was given in evidence, which showed entries of payment of two sums to Inskip of 500*l.* That book also contained payments by Inskip of interest on 2000*l.* every half-year, thus—"To half-year's interest on 2000*l.*, 50*l.*" The last entry was dated the 2nd April, 1860, a short time before the testator's date for payment of the interest on 2000*l.*

Argument.

Mr. *Malins* and Mr. *Woodroffe*, for the plaintiffs, submitted that by the ordinary rule of law, an obligation under seal could not be cancelled by a mere verbal arrangement such as was alleged, even if it were proved.

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Argument.

THE VICE-CHANCELLOR.—Having regard to the confidential relation between the testator and the obligor, according to Mr. Inskip's own statement, it rests with him to show the validity of his claim.

Mr. *Bacon* and Mr. *Karslake*, for Inskip. It could not be denied that the testator had the right to deal with his property as he pleased; he had quarrelled with his relatives, and was on terms of great intimacy with Mr. Inskip. Suppose the testator had put the bond in the fire as he threatened to do, could it be disputed but that in that case the debt would be released. But he did what was equivalent, he discharged the bond by appointing Inskip his executor. In *Sir John Needham's Case* (*a*), it was held, that if the obligee made the obligor his executor, it operated as a release of the debt, because it was the act of the obligee himself. In *Cheetham* v. *Ward* (*b*), it was laid down that if the obligee of a joint and several bond made one of two obligors, his executor with others, the bond was discharged as to both. It was submitted, therefore, that the certificate was right.

Judgment.

THE VICE-CHANCELLOR:—

It seems to me that Mr. Inskip remained, and still remains, a debtor to the testator's estate in the whole amount of this bond. The case which he attempts to set up is, first that, although the bond is for the sum of 2000*l.*, he never received more than 1500*l.*; nay more, that he executed the bond a week before he had received a single farthing. That is a very singular story, but he has sworn to it. The story is certainly materially contradicted by the entries not only of the testator but of Mr. Inskip himself. During the month next preceding the testator's death, Mr. Inskip, in that relation of un-

(*a*) 8 Coke 136, 3rd resolution. (*b*) 1 Bos. & Pull. 630.

bounded confidence in which he was to the testator, recording transactions of the testator as to his money matters, records in the testator's book that he had paid in cash to the testator the interest upon the whole sum of 2000*l.* as due to the testator upon his own bond. So strong a piece of evidence, under his own handwriting, is not easily to be got rid of, and, in my opinion, in this case it has not been got rid of at all. The state of affairs as to the bond, therefore, up to that last entry in the handwriting of Inskip, which is dated the 2nd April, 1860, removes all doubt on my mind as to the fact, that on that day, as recorded by himself, he owed the testator 2000*l.* on the bond which is found in the testator's repository. The next part of the case is, his attempt to show that, at an interview between himself and the testator on the 4th April, what passed amounts to a release of all the obligation and debt which improved by the bond. The argument on this part of the case, so far as it refers to the legal doctrine of the extinguishing of a debt by the appointment of the debtor to be an executor, has no application to the present case. That doctrine never prevailed in equity, and is subject to great modification at law. In the present case, if it were necessary to consider the doctrine, it would appear that, contemporaneously with the will which appoints the debtor executor, the testator, by a written declaration and letter of direction to his executors, declared that part of his estate, which they were to administer, consisted of this very bond by which the debt was secured to his estate from one of his executors, and under the bond of that executor. It is needless to consider the legal doctrine, because in this Court the appointment of the debtor to be an executor is of no effect as evidence of the extinction of the obligation. Then, on what ground is it said that this debt, by specialty under the hand and seal of Inskip, the executor, has been released? Upon a

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Judgment.

conversation of the most extraordinary kind, at an interview where the conduct of the testator, as described by Mr. Inskip, was hardly that of a rational man. It is needless to go into the particulars of the interview, from the gross absurdity of what is said to have passed. It is enough to say that, taking the view most favourable to Mr. Inskip, the testator left the transaction in this state—that he did not deliver up the bond which is said to have been released; that he said he would not then deliver it up, but would deliver it up at a future time, which never occurred; and that the whole transaction, as to anything in the shape of a release of the obligation, amounted to no more than to an expression by words of an intention of bounty, and an intention to deliver up the bond which constituted the obligation, which intention never was fulfilled. An act of bounty left so incomplete could hardly prevail under any circumstances. But considering that this was the case of a debtor to the testator, where the debtor was in the position, as he describes it, of one possessing the unbounded confidence of the testator, and conducting all his transactions, and where all that it is insisted on was, that a release took place at this private interview, it is quite plain, on the doctrines of this Court, that even if much more had taken place, it would have been difficult to show that any bounty, obtained under such circumstances, could be maintained as a valid gift. I have great difficulty in allowing Mr. Inskip his costs, because in the present case the claim of Mr. Inskip is made by him in the suit for the administration of the estate, and an account of that estate of which he is trustee, and in a suit in which he is a defendant, and the question as to the validity of the transaction is a question in the cause. The inquiry was directed by an order in the cause, and as that order was obtained for the benefit of Mr. Inskip, to enable him to maintain his case if he could; therefore,

he must pay the costs of the inquiry, and of so much of the motion as related to his claim in respect of the bond. He must also pay into court the sum of 2000*l.*, with interest at 5*l.* per cent. from the 1st of April, 1860, within three months.

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INSKIP'S CASE (1).

Judgment.

INSKIP'S CASE (2) (*a*).

THE next claim was for 362*l.* 6*s.* 3*d.*, which Mr. Inskip claimed to have allowed on the ground that under the testator's direction he had purchased a plot of ground as the site for a school. The chief clerk allowed the claim, and this was an appeal against that part of the certificate.

An executor by the testator's direction having negotiated for the purchase of a site for schools in connexion with a new church, to which the testator had largely contributed, but there being no binding contract at the death, subsequently completed, and took a conveyance to himself.—*Held* not entitled to charge the purchase-money against the estate.

Mr. Inskip, by his answer in *Humpage* v. *Inskip*, alleged that in 1859 the testator, through him, had given the sum of 3000*l.* towards the building of a new church to be called St. Luke's, in the parish of Bedminster, Bristol; of this sum 2000*l.* was paid about the 27th of July, and 1000*l.* about the 26th of October in the same year. He alleged that it was intended there should be schoolrooms beneath the new church, and that it was subsequently found that Government could not grant any money for schools so situated. Under these circumstances the testator, shortly before his death, directed Mr. Inskip to look out for a new piece of ground, and in the beginning of May last he (Inskip), in his own name, but on the testator's behalf, entered into an agreement to purchase a piece of ground for 300*l.* That he submitted the contract for such purchase to the testator, and the testator approved of it, and that he (Inskip), signed it in the testator's presence. The testator died before the

(*a*) *Antè* 337.

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INSKIP'S CASE (2).

Statement.

execution of the conveyance, which took place in June, 1860, and that he, (Inskip), had, since the testator's death, been forced to pay the said purchase-money of 300*l.* He said that he entered into the contract merely as agent for the testator, and that the vendors of the land, their solicitor and surveyors, were, from the commencement of the negotiation, informed of the fact that he was acting in the matter only as the agent of the testator. He said further that he had also executed a deed whereby he had covenanted with the said Messrs. Wise that parochial schools in connection with the new church should be erected on the said piece of ground within twelve months from June, 1860, and that no other buildings should be erected thereon.

The contract referred to above was not produced.

Mr. Wise deposed, that a negotiation was going on between him and Mr. Inskip for the purchase of the land up to April, 1860, when Mr. Inskip agreed to purchase the ground for 300*l.* and to pay all costs of and incident to the preparation of the deeds, and a fair proportion towards making roads and sewers in or upon the said land, and keeping the same in repair.

Mr. Barker, solicitor, also deposed to the contract, and that the deed of conveyance was executed by the vendors and Mr. Inskip on the 5th June 1860. Mr. Inskip at the same time paid the purchase-money, and also his (Mr. Barker's) bill, amounting to 22*l.* 15*s.* On the 27th September, 1860, Mr. Inskip paid to Mr. Wise a sum of 31*l.* 17*s.* as the proportionate part of the expense of making a culvert in the said piece of ground.

Mr. Inskip, on cross-examination, stated he was informed that he was bound to complete the contract, and referred to the following letters in support of that view.

"To — Inskip, Esq. 23rd August, 1859, Albion Chambers, Bristol. Dear Sir, — My clients, Messrs.

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INSKIP'S CASE (2).

Statement.

Thomas and George Wise, inform me they have offered to you for 300*l.*, a quarter of an acre of their building land in Weane Mead, Bedminster, for a school. The title is a perfectly good one, and they were kind enough to suggest my preparing the conveyance for 15*l.*, which I shall feel much pleasure in doing. Will you have the goodness to tell me if you accept their offer? I am, dear Sir, yours obediently, T. BARKER."

"To Mr. Wise, Bristol, 19th December, 1859. Dear Sir,—May I beg the favour of your considering again the price I offered of 300*l.*, for the land I have been in treaty for, and if you really cannot and will not accept that sum, the 15*l.* difference must be thrown upon the funds. Your reply will oblige, yours truly, E. T. INSKIP."

"Bristol, 14th May, 1860. Dear Sir,—Wise to yourself. I shall be obliged by your returning the draft herein, as my clients seem to feel that I am to blame for the delay. Yours obediently, T. BARKER."

Mr. Inskip further said, that the reason why the conveyance was not executed until so long after the agreement was, that he and the testator were negotiating for a reduction of price; the testator wanted to get the land for 100*l.*, and he objected to the price asked as being too much, but finding they would not sell for less, he agreed to give it.

Argument.

Mr. *Malins*, and Mr. *Woodroffe*, for the plaintiffs, submitted there was no contract binding at the testator's death, and that Mr. Inskip had purchased on his own account.

Mr. *Bacon* and Mr. *Karslake*, for Inskip, submitted it was gross bad faith to leave Mr. Inskip to fulfil the contract which he had entered into by the testators directions, at the same time the land was worth the money,

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INSKIP'S CASE (2).

and it was immaterial whether Mr. Inskip kept it or not, provided the question was settled.

Judgment.

THE VICE-CHANCELLOR:—

The question is, whether the money paid by Mr. Inskip was the testator's money, and I am of opinion that not a farthing of it was. There is no evidence of agency—there is no evidence of contract binding the testator. If there was no agency there could be no contract. If there was an imperfect contract binding the testator's assets at his decease, then Mr. Inskip would be entitled to stand as a creditor; but there is no evidence of any contract existing at the time of the testator's death by which the testator can be considered as bound. That being so, the certificate is wrong in declaring Mr. Inskip to be a creditor for a sum of money which was paid by himself as his own money for land, conveyed to himself, and conveyed, as I am bound to hold, not under any contract made by the testator, or with the testator's authority. The certificate, therefore, must be varied, but I cannot make Mr. Inskip pay the costs of this part of the motion, for it is a very difficult case.

FARRALL *v.* DAVENPORT.

1861.
May 4th.

Possession and expenditure on the faith of a parol agreement to grant a lease of a farm, held sufficient to entitle the tenant to a lease, although the agreement was denied by the defendant.

THIS was a bill for specific performance of an agreement to grant a lease of a farm at Tilston Fearnall. The bill alleged that at and immediately prior to the agreement the land was in a rough, dirty, and impoverished state, and not worth 1*l.* an acre to a yearly tenant, and had previously been let for 140*l.*

That in January, 1858, the defendant wished to let the farm to the plaintiff, and in order to come to some agreement, on the 12th January, 1858, called on the plaintiff, and proposed to him to take a lease of the farm at 200*l.* per annum. At the time when the defendant made such proposal, and during the conversation that followed, there were present the plaintiff, his wife, and son, Thomas Farrall, William Speed, the defendant, and Thomas Teesdale. Considerable discussion arose between the plaintiff and the defendant on the proposal of the defendant, the plaintiff pressing to have a lease for twenty-one years, and the defendant seeking to limit it to fourteen years. It was at length agreed between the plaintiff and the defendant, in the presence of the parties aforesaid, that the defendant should grant to the plaintiff a lease of the farm for fourteen years, from the 2nd February, 1858, at the rent of 200*l.* a year. After the said agreement, some further conversation took place in the presence of the aforesaid parties, as to by whom the intended lease should be prepared, and it was then agreed that the same should be prepared by the defendant's solicitor.

Immediately after the said agreement was entered into and in part performance thereof, the plaintiff, with the full knowledge and consent of the defendant, took possession of the farm, and set a large number of men to

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FARRALL v. DAVENPORT.

Statement.

work thereon, and proceeded to stock up the old hedges, fill up the pitholes, and drain the land, and straighten the fences, and plant new quicksets. The plaintiff purchased a great quantity of Chester manure and bone manure, and purchased all the draining tiles necessary for the said drainage of the land at his own expense, and drained, at his own expense, every acre of the said land that required draining, and cleaned and manured with bone manure large quanties of the said land, and laid the same down on permanent pasture.

A few days after the plaintiff had taken possession of the said farm the defendant came over to the farm in company with the said William Speed for the purpose of marking such of the trees in the hedges as the plaintiff was to cut down, and on that occasion the defendant, in the presence of William Speed, expressed his approval of what he, plaintiff, was doing, and said he was getting on wonderfully. The defendant was in the frequent habit of going over the said farm for the purpose of shooting, and he then saw the plaintiff, and spoke to him of the great improvements he was making; and the plaintiff, on such occasions, continually asked the defendant to get the promised lease ready, and the defendant said he would see his solicitor and have it done.

The plaintiff, in further part performance of the said agreement, duly paid to the defendant, and the defendant, in part performance of the said agreement, received, the first and second half-year's rent of the said farm, at the rate of 200*l.* per annum, under the aforesaid agreement; and when the third half-year's rent became due the plaintiff, being very dissatisfied at not having received his said lease as agreed upon, sent a message to the defendant by the said Thomas Teesdale, to the effect that the plaintiff would not pay the defendant his rent unless he gave him the lease according to his promise, and the said Thomas Teesdale on that occasion returned to the

plaintiff, stating that the defendant, in answer to such message, had said that he, the plaintiff, "must make himself content; it was all right; that he had been with Mr. Parry Jones and made his will, and left the farm for the plaintiff and Mrs. Farrall, and the plaintiff's son Tom, for the term out." The plaintiff was, however, still dissatisfied with the said message, and the plaintiff thereupon sent his wife to the defendant with the third half-year's rent, and on the plaintiff's wife seeing the defendant on that occasion, she said to him, "Mr. Davenport, we have let the rent slip a little past the time, but you know the reason; it is on account of the lease; life is very uncertain, and we have been very uneasy about it." And thereupon the defendant pointed to a drawer and said, "It is in that drawer, and wants a little alteration, which I will get done and bring it." The plaintiff's wife then said to the defendant, "Will you bring it up soon?" And the defendant then said, "I'll come some day myself soon." And the plaintiff's wife then said to the defendant, "Come next week if you please." And the defendant replied, "I'll come soon." And the plaintiff's wife then said to the defendant, "I shall now be a deal more satisfied, and take your word as a gentleman, Mr. Davenport." And the plaintiff's wife then paid to the defendant the said third half-year's rent.

The bill alleged that, notwithstanding the promises of the defendant, he did not send the plaintiff the lease and draft of a lease; and on the fourth half-year's rent, under the agreement, becoming due, the plaintiff went to the defendant, and told him that it was very unhandsome of him that he had not given him the lease according to his promise, and that he might as well have robbed him of 1000*l.* as not give him the lease, and angry words then ensued between the plaintiff and the defendant in reference to the defendant not having brought or sent the said lease.

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FARRALL v. DAVENPORT

Statement.

In the latter part of July, 1860, the defendant sent to the plaintiff, by William Speed, an agreement, which William Speed said the defendant required the plaintiff to sign, and which he was to bring back. The agreement contained the following stipulation:—

"An agreement made this day of July, 1860, between Edward Davenport, of the Oaklands, in the county of Chester, gentleman (landlord), his heirs and assigns, on the one part; and John Farrall, of the township of Tilston Fearnall, in the county of Chester (tenant), on the other part. First, the said Edward Davenport doth hereby agree to let, and the said John Farrall to hire, all that messuage, or tenement and farm, with houses, outhouses, buildings, gardens, lands, hereditaments, and appurtenances thereto belonging, situate in the township of Tilston Fearnall aforesaid; all of which lands contain, by admeasurement, 100 statute acres, or thereabouts, be the same more or less, for the term of one year, commencing the 2nd day of February last, and so on, from year to year, until the same shall be determined, by six months notice prior to the 2nd February, given in any year by either party. Yielding and paying yearly unto the said Edward Davenport, his heirs or assigns, the rent or sum of 200*l.* of lawful money as used in Great Britain, by four equal quarterly payments in the year, namely, on the 25th March, the 24th June, the 29th September, and the 21st December, which quarterly payments shall be considered as due and payable in advance; and if not then and so paid, shall and may be recoverable, as well by distress in the usual manner as by action at law."

The said agreement contained stringent provisions, giving the exclusive right of shooting and fishing to the lessor; that the tenant should preserve the game and keep a dog for the use of the lessor, and as to the mode of farming. There was also a provision that if the

tenant should "make default in the performance of any of these agreements it should be lawful for the lessor to enter and evict on payment of a proper sum for the value of crops, &c., over and above the rent.

The plaintiff refused to execute this agreement as not being in accordance with the verbal agreement made on the 12th January, 1860. In August, 1860, the plaintiff was served with a notice to quit on the 2nd February, 1861, as if he had been a yearly tenant.

The bill alleged that the plaintiff, at the time he was served with such notice, had expended more than 1000*l.* on the farm, and thereby rendered it of the annual value of 250*l.*, and that the improvements were of such a nature as was not customary for yearly tenants to do.

The bill alleged that on the 31st August, 1860, he saw the defendant, who said, "Well, if you sign that agreement we'll be all right." When the plaintiff replied, "I shall never do that after you promised me a lease." The defendant then, for the first time, denied that he had ever entered into an agreement to grant a lease of the farm, and said it should be settled by law. The bill alleged that the defendant intended to eject the plaintiff.

The defendant, by his answer, alleged that, in November, 1857, he recovered possession of the lands in question. He deemed that the plaintiff was a practical farmer, but had been first a servant in the family of the Rev. J. Martin, of Banbury, where his employment was the care of a horse, cow, and garden; that he afterwards became a publican and dealer in horses, and ultimately tenant of a grazing farm of thirty acres.

He alleged that, in November, 1857, the plaintiff caused William Speed the younger to come to his house, requesting him to let the plaintiff have the farm, when he directed the said William Speed to inform the plaintiff that he would let him have the farm on the same terms as a person named Buckley, who had negotiated for the

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farm; the terms were the same as those of a Mr. Tollemache, a large landowner in the neighbourhood. The answer denied the verbal agreement alleged in the bill to have taken place on the 12th January, 1860, and demurred generally to the case made by the bill.

Mr. *Malins* and Mr. *Martindale*, for the plaintiff, contended that on the evidence it was clear that there was a final agreement for a lease, on the faith of which the plaintiff had taken possession of the farm and expended large sums of money on improvements. It was submitted that the possession with expenditure took the case out of the Statute of Frauds.

Mr. *Bacon* and Mr. *E. R. Turner*, for the defendant, contended that the evidence of the plaintiff failed to show the agreement contended for by the plaintiff, and the defendant's evidence completely disproved it. The case as to the possession and expenditure was that they were referable to the lease which the defendant was willing to grant. It was submitted, therefore, that the plaintiff's case failed.

Judgment.

THE VICE-CHANCELLOR:—

The first question is, whether there is evidence of a parol agreement by the defendant to grant a lease for fourteen years at a rent of 200*l.* per annum sufficient to enable the Court to decree specific performance. There is considerable conflict in the evidence, but, looking at the whole, and especially at the evidence of three persons, and contrasting it with the evidence of the defendant and Mr. Teesdale on his behalf, I can come to no other conclusion than that before the plaintiff took possession of the farm the defendant agreed to grant him a lease for fourteen years at a rent of 200*l.* per annum. The inconsistency of the state-

ments made by the defendant tends to this conclusion.

Upon the defendant's second statement, in the ninth paragraph of his affidavit, it is clear that in January there was a meeting, at which the four persons mentioned by the plaintiff were present, and at that meeting, or on that occasion, whether in the presence of the four persons or not, the terms on which the plaintiff was to become the tenant of the farm were mentioned. This the defendant in his affidavit admits, though he did not admit it in his answer. But further, I find that the four persons present on this occasion, who the defendant swears were in the house at the time, but, as he says, out of hearing, clearly and distinctly swear that they heard the defendant agree to grant a lease of the farm to the plaintiff at a rent of 200*l.* a year. It is impossible not to be struck with the affidavit of Mr. Teesdale, because, being made in support of the defendant's case, he goes as far as the evidence of the defendant will permit, to affirm the statement made, not in the defendant's answer, but in the affidavit which describes the meeting in the house in the month of January. The great object for the defendant to prove as to this meeting would have been that the four persons were present in the plaintiff's house, and that it was the plaintiff's wife who asked for the lease for fourteen years, and that the defendant refused to grant it. But the real question was, as to the time when the plaintiff's wife asked for a lease, and the time when the defendant refused it, because all parties are agreed as to what took place at the subsequent time. The time, then, being the great question, what does Mr. Teesdale say? He says, "I very well recollect the following circumstance, that on one occasion, but when in particular I cannot say further than that it was after the plaintiff had possession of the house." He does not swear that it was in the year 1858, but simply

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after the plaintiff had possession of the farm. If he had said it was on the 16th January, I should then have had to contrast what he and the defendant swear took place at that time with the evidence of the plaintiff, his wife and son, and Mr. Speed. But the evidence of Mr. Speed seems to me decisive; first, because he is a disinterested witness, and also because I cannot rely on the evidence of the defendant, who, in his answer, ignored this meeting of January, 1858, altogether.

The case made by the defendant is wholly unconnected with the meeting at the house of the plaintiff. He says that Speed came to him on behalf of the plaintiff, when he informed him the plaintiff might be a tenant on one of Mr. Tollemache's agreements. With regard to the meeting of the 12th January, 1858, he says, "I do not know, and cannot set forth as to my belief or otherwise, whether I did on the 12th January, 1858, or on any other day previous to the 17th January, 1858, call on the plaintiff, or, if I did call, why I did so call." Neither does he in his answer state what he subsequently stated in his affidavit of the meeting, which he alleges took place on the 16th, 17th, or 18th January, 1858, when the plaintiff, he alleges, took him into a private room, being then in possession of the farm, and said he would be satisfied with Tollemache's agreement. On the whole there is not that uniformity and consistency of statement on the part of the defendant himself, nor sufficient corroboration of his statement, to enable the Court to say, on the weight of the evidence, that the plaintiff has not proved his agreement for a lease for fourteen years at a rent of 200*l.* per annum.

Then it is said that this is a case in which the acts of part performance—the expenditure of money on the faith of the agreement alleged by the plaintiff—may all be referred to the agreement admitted by the defendant. But I cannot find upon the defendant's statement any

admission of any agreement before the possession at all, His story in his answer—in the fourth page of his printed answer—is "That in November, 1857," which was when William Speed the younger came, and Speed proposed on behalf of the plaintiff that the plaintiff should be tenant and occupier. That is not a statement of an agreement at all, and the amended statement in his affidavit, which brings it down to January, and according to him to the time when the plaintiff was in possession, has nothing to do with the evidence in this case, and is no statement of an agreement to which the acts of part performance can be referred. The evidence is clear upon this, that immediately after the agreement, whatever be the date (and I have no doubt as to the time), the plaintiff's expenditure began, and it did not begin after that alleged interview spoken to by the defendant in his affidavit and not in his answer, if that were the same interview (which does not appear) as to which, Mr. Teesdale is speaking. Therefore the case is one in which there is clear proof of a parol agreement for a lease of fourteen years at a rent of 200*l.*, and immediately thereupon and upon the faith of that agreement there was expenditure by the plaintiff, which brings the case within that principle of the Court, now so well established, that if the agreement be by parol, and therefore insufficient according to the Statute of Frauds, yet if there was possession taken and expenditure of money upon the farm on the faith of a verbal agreement, then that binds the defendant, and is enough to induce the Court to decree a specific performance of the agreement for a lease. Here, therefore, I feel bound upon the weight of evidence, and notwithstanding the contradiction in the testimony, to decree in favour of the plaintiff; and the plaintiff having succeeded to my satisfaction, there must be a decree for payment of the costs up to and including the hearing by the defendant to

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the plaintiff, a decree for the specific performance of the agreement for a lease for fourteen years at the rent of 200*l.*, and that lease to be settled in chambers if the parties differ.

1861.
December 6.

Re ST. PIERRE B. HOOK, SOLICITOR.
Re 6 & 7 VICT. c. 73.

Charges in a solicitor's bill apparently excessive, and alleged to be overcharges, held special circumstances under the 6 & 7 Vic. c. 73 sufficient to authorize the Court, under the 6 & 7 Vict. c. 73, s. 37, to direct the bills to be taxed more than twelve months after delivery, although one item complained of was sworn to be a mistake.

THIS was a petition by Bethell Walrond, Esq., praying that certain bills of costs delivered to him by Mr. Hook, his former solicitor, twelve months previously, might be taxed.

The petition stated that Mr. Walrond employed Mr. Hook as his solicitor from the 16th March, 1859, to the 13th May, 1860. On the 5th June, 1860, Messrs. Tamplin and Taylor, acting as solicitors for the petitioner, obtained an order calling on Mr. Hook within one week to deliver to Mr. Walrond a bill of costs in all causes and matters in which he had acted for that gentleman, giving credit thereon for all sums of money received by him on account of Mr. Walrond. It was also ordered by consent that on Mr. Walrond paying 300*l.* to await the further order of the Court, Mr. Hook should deliver up to Mr. Walrond or his attorney certain papers specified in the order. Prior to the 6th June, 1860, when Mr. Walrond paid 300*l.* into court, Mr. Hook had delivered three bills of costs for the sum of 88*l.* 15*s.* 8*d.*, 363*l.* 17*s.* 4*d.*, and for the sum of 301*l.* 15*s.* 2*d.*; together with such bills there was a cash statement, which, after taking credit for sums paid, showed a balance due to Mr. Hook of 485*l.* 3*s.* 2*d.*

On the 20th June, 1859, Mr. Hook delivered to

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Re ST. PIERRE B. HOOK, SOLICITOR. *Re* 6 & 7 VICT. c. 73.

Statement.

Mr. Walrond his first bill of costs for 88*l.* 15*s.* 6d., which Mr. Hook paid on the 3rd July, 1859, by a cheque on his bankers. The petition alleged that Mr. Walrond paid this bill, which, it was alleged, contained numerous overcharges, under pressure. Among the alleged overcharges were the following:—

"In Chancery.—*Cook* v. *The Earl of Rosslyn.*

"Drawing your affidavit—fo. 107	£5	7	0
"Engrossing same	1	15	8
"Paid for office copy	1	15	8
"Instructions for your affidavit, verifying lease .	0	6	8
"Drawing same—fo. 22	1	2	0"

It was alleged in the petition that the said affidavits for proving deeds were not original matter, but were copied from deeds and other documents, and the copies would not have been allowed on taxation.

"Perusing copy of your marriage settlement sent me by Mr. Drake, 39 sheets . . . . . £4 6 8"

It was also alleged that the marriage settlement had been perused by Mr. Hook in reference to other business, and had been charged for elsewhere.

"Attending court on motion when the plt.'s bill was dismissed, all parties to bear their own costs, the plt., if he desired it, to be repaid his money, and in that event the action to proceed £2 2 0"

The petition alleged that on taxation the fee for attending court on motion was only 1*l.* 1*s.*

A second bill of costs for 363*l.* 17*s.* 4*d.* was delivered on the 21st April, 1860, and a third bill for 301*l.* 15*s.* 2*d.* on the same. The last bill was for costs of defending an action brought by an hotel-keeper against Mr. Walrond for board and lodging supplied to Mr. Walrond's wife and daughter. The cash account showed a balance of 485*l.* 3*s.* 2*d.* The following items were objected to:—

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Re ST. PIERRE B. HOOK, SOLICITOR. *Re* 6 & 7 VICT. C. 73.

Statement.

"In the Exchequer of Pleas.—*Yourself* v. *Jackson.*

"1859. Nov. 23.—At your request making two copies of the book of correspondence between Lady Janet, Lord Vernon, and yourself; folios together, 1320	£22	0	0
"Instructions for brief.	10	10	0
"Copies of correspondence for counsel . . .	64	10	0"

The first of these items, it was contended, related to family differences that had occurred ten years previously, and had no references to the suit of *Jackson* v. *Walrond;* that the charges for copies for counsel of correspondence, and of various proceedings on the trial at law, were wholly unsustainable.

"*Re Robinson and Tomlin.*			
"1859, March 17.—Perusing Messrs. Robinson and Tomlin's bills of costs, consisting of 74 sides	£3	4	0
"May.—Engaged sorting the various papers, and arranging same several hours	1	1	0"
"Lady Erskine's Settlement.			
"Nov. 14.—At your request, by letter of the 13th Nov. 1859, perusing the large bundle of papers, consisting of settlement and papers in the suit relating to this petition, for the purpose of making out account of sums due to you in this matter; engaged thereon for three hours	2	2	0"
"*Re Kennaway.*			
"April 18.—Perusing Mr. Kennaway's three bills of costs in the several suits for the purpose of checking their bills and charges, 234 sides	5	17	0"
"*Re Marriage Settlement.*			
"July 12.—Making eight copies petition to appoint new trustees for service, 21 brief sheets each	28	0	0"
"In Chancery—*Walrond* v. *Lord Rosslyn.*			
"*Yourself* v. *Walrond.*			
"March 17.—Attending you and receiving your instructions to defend this suit on your behalf, and perusing and considering large bundles of papers thereon from the commencement thereof to the hearing . . .	4	4	0"

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Re ST. PIERRE B. HOOK, SOLICITOR. *Re* 6 & 7 VICT. c. 73.

Statement.

" *Yourself* v. *Lady Walrond.*			
" March 17.—Attending you and receiving your instructions to defend this suit for you, perusing and considering papers	2	2	0
" April 9.—Perusing papers at your request sent in by Mr. Cook, viz. copy correspondence delivered to counsel	5	10	0"
" General.			
" 1859, June 4.—At your request, perusing the private correspondence between Lady Janet, Lord Vernon, and yourself (together with your observations thereon) consisting of 180 pages of foolscap	9	0	0"
" *Yourself* v. *Walrond.*			
" 1859, Dec. 31.—Drawing retainer to Mr. Roundell Palmer, and copy	0	5	0
" Fee to him and clerk	1	3	6
" Attending him	0	6	8"

The petitioner alleged that he had been informed and believed that Mr. Roundell Palmer was not retained by Mr. Hook on the 31st December, 1859, and that no fee of 1*l.* 3*s.* 6*d.* was paid; and on this being mentioned to Mr. Hook, the latter sent in an amended cash account, giving the petitioner credit for 1*l.* 15*s.* 2*d.*, stated to be " charges for retaining Mr. Palmer, omitted to be done."

A subsequent bill of costs for 280*l.* 5*s.* 1*d.* was delivered to Mr. Walrond by Mr. Hook on the 28th February, 1861, under an order obtained at the Rolls. On the 10th June, 1861, all the four bills were taken in before Master Parkes to be taxed; but as the three bills had been delivered more than twelve months, Mr. Walrond was obliged to apply by petition under the Act for an order to tax, and that if it should appear that the said bills had been overpaid Mr. Hook might repay such amount, and on payment of such taxed bills that Mr. Hook might deliver up all deeds, documents, &c., in his possession or power.

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Re ST. PIERRE B. HOOK, SOLICITOR. *Re* 6 & 7 VICT. c. 73.

Argument.

Mr. *Malins* and Mr. *Downing Bruce*, for the petitioner, submitted that on the face of the bills themselves the overcharges were so excessive as to amount to special circumstances within the meaning of the 37th section of the statute.

Mr. *Hardy*, for Mr. Hook, submitted that as to the bill for 88*l.* it was in evidence that it had been paid and settled more than two years previously; and, therefore, by the 41st section of the Act it could not now be taxed.

As to the two other bills, in order to entitle the petitioner to taxation after the expiration of twelve months from delivery, he must prove special circumstances within the meaning of the Act. In *Ex parte Pemberton* (*a*), where a solicitor, having delivered his bill of costs and retained the amount out of monies in his hands before the close of 1850, was discharged in July, 1851, an application to tax in October, 1852, was refused, Lord Cranworth holding that the Court had no jurisdiction.

In *Re Barnard* (*b*) it was held that where special circumstances were relied on the application must be made promptly. In that case it was also held that mere overcharges were not special circumstances within the meaning of the Act.

And in the case of *Re Strother* (*c*), Vice-Chancellor Wood, in commenting on that case, explained the principle to be, that overcharges not amounting to fraud are not special circumstances entitling a client to have a bill taxed twelve months after delivery.

The cases of *In re Downes* (*d*), and *Harper* and *Parry Jones* (*e*), were cited.

(*a*) 2 De G. M. & G. 960.
(*b*) 2 De G. M. & G. 359.
(*c*) 3 K. & J. 518.
(*d*) 5 Beav. 425.
(*e*) 10 Beav. 284.

1861.

Re St. Pierre B. Hook, Solicitor. *Re* 6 & 7 Vict. c. 70.

Judgment.

Mr. *Malins*, for the petitioner, waived the taxation of the bill for 88*l.*

The Vice-Chancellor:—

The greater part of the charges set out in the petition and challenged by the petitioner are of such a nature and to such an amount as constitute special circumstances, so as to give a right to an order that the taxing Master should look through these bills and certify his opinion as to the propriety of the items charged. It is said that, as to part of the petition which relates to a bill of 88*l.*, the counsel for the petitioner, in the exercise of their discretion, have declined to press the claim, and that that part of the petition ought to be dismissed with costs. But I can see no reason for dismissing that part of the petition with costs. It is quite enough that that part of the relief has been waived. The statements of fact as to the relief prayed in respect of that particular bill have reference to very small matters, but they are not so unimportant as to justify me in saying that that part of the petition should be dismissed. There must be an order for the taxation of the other two bills, reserving all question of costs.

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December 7.

Re THE TRUSTEE RELIEF ACT.
Re PARTINGTON'S TRUST.

Gift by a testator of real and personal estate to trustees on trust for his brothers and sisters for life, with a direction after the decease of the survivor of them to sell and to divide the proceeds unto and equally between all his nephews and nieces, grandnephews and grandnieces, to take *per capita*, with power to apply the presumptive shares for advancement and maintenance.—*Held*, that all the class, including those born after the testator's decease, were entitled *per capita*.

WILLIAM PARTINGTON by his will, dated the 2nd February, 1836, gave his personal estate to trustees in trust for conversion and investment, and in further trust to stand possessed of the dividends, interest, and proceeds on the same trusts as were thereinafter declared of and concerning his real estate. The testator then devised all his real estate to the said trustees and their heirs on trust, during the lives of his brothers and sisters and the lives and life of the survivors and survivor of them, to pay one-seventh of the rents and profits, and also the dividends, interest, and proceeds of the moneys to arise from the conversion of the personal estate to his nephews William and John Partington, with benefit of survivorship; another seventh to his (testator's) brother John Partington for life; a third seventh to testator's brother Benjamin Partington for life; a fourth seventh to testator's sister Jane Curtis for her life; a fifth to his sister Mary Farr for life; a sixth to his sister Sarah Dry for life; and the seventh share to and equally between his nieces, Jane the wife of George Hodges, Elizabeth Paine, spinster, and testator's grandnephews and grandniece, Frederick Paine Watson, Alfred Watson, and Matilda Watson, "for and during the lives of his (testator's) said brothers and sisters, and the lives and life of the survivor of them (with benefit of survivorship between them in case of the death of any or either of them without leaving lawful issue): and upon the death of either of the parties entitled to the before-mentioned shares or share, or part or parts of shares or share (leaving lawful

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Re THE TRUSTEE RELIEF ACT. *Re* PARTINGTON'S TRUST.

Statement.

issue), upon trust to pay the share of him or her so dying unto and equally between his or her children for so long a time as any one of the testator's said brothers or sisters should live. And upon the decease of the survivor of his said brothers and sisters," then in trust to call in the residuary personal estate and to sell the real estate, and to stand possessed of the moneys to arise by the sale of the said real estate, "and the intermediate rents and profits thereof, and of the before-mentioned trust-moneys and dividends," upon trust for and to pay and divide the same unto and equally between all his (testator's) nephews and nieces and grandnephews and grandnieces, to take *per capita*; to whom he gave the same accordingly. The will also contained a power for the trustees and trustee to pay and apply the income of the "presumptive" share of any person entitled thereto under that will of and in the said trust-money, during the minority of such person or persons, towards the maintenance and education of such person or persons. There was also a provision for advancement out of the share or shares of any person who should be "presumptively" entitled thereto.

The testator died on the 3rd March, 1837, one of his sisters having pre-deceased him. Another sister, Sarah Dry, was the survivor, and she died in December, 1859.

Argument.

Mr. *Bacon* and Mr. *Walford*, for the trustees, who presented the petition, said the question now was, whether such of the testator's nephews and nieces and grandnephews and grandnieces as were born after his death were entitled, and also whether such of them as died after the testator, but before the tenant for life, took any interest in the fund. If the gift was contingent, as the word "presumptive" might seem to intimate, those who pre-deceased the survivor of the tenants for life would be excluded.

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Re THE TRUSTEE RELIEF ACT. *Re* PARTINGTON'S TRUST.

Argument.

Mr. *J. H. Palmer* and Mr. *Hardy*, for those grandnephews and grandnieces who were born in the testator's lifetime and were now living, contended that only those who were living at the testator's death were the objects of his bounty, and that those who died before the period of distribution arrived were not entitled. These words were words of present gift, subject to a life-interest; but the testator spoke of the shares as "presumptive" shares, meaning thereby that the share of a person who might die in the lifetime of the tenant for life should fail.

Mr. *Malins* and Mr. *Osler* appeared for the representatives of those nephews and nieces, grandnephews and grandnieces, who were living at the testator's death and had since died, but they were not called upon.

Mr. *Bovill* and Mr. *W. Forster* appeared for other parties.

Judgment.

THE VICE-CHANCELLOR:—

The testator by his language shows that he meant to include amongst the objects of his bounty the whole class of his nephews and nieces, grandnephews and grandnieces; and intended that the representatives of those who had died in the lifetime of the tenant for life, and those who were living, should take. The declaration should therefore be that, according to the true construction of the will, all the nephews and nieces, grandnephews and grandnieces, of the testator who were living at the time of his death, and who were born at any time afterwards in the lifetime of Sarah Dry, took vested interests in the real and personal residuary estate, and took *per capita*.

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TARDREW *v.* HOWELL.

November 8.

Under the 28th section of the 23 & 24 Vic. c. 127, the town agent held entitled to a charge on all property recovered in three suits, for an unascertained balance due to him by the country solicitor.

THIS was a petition by Mr. E. Lett, presented under the 28th section of the 23 & 24 Vic. c. 127, that such order might be made for the adoption of the result of the said taxation as the measure of the petitioner's claim for costs (exclusive of the costs of and incident to the petition), and for the taxation of such last-mentioned costs, or for such taxation or other determination of the amount of such costs (including therein the costs, charges, and expenses of the petitioner properly incurred of and incident to the petition) as the Court should think fit; and that it might be declared that the petitioner was entitled to a charge upon all and singular the sums of money and other property recovered or preserved in these suits, or any of them, or payable to the said Thomas Parry, either for costs or otherwise, in respect of any order made, or to be made therein, for the said sum of 86*l.* 10*s.* 5*d.*, together with such costs of and incident to the petition as aforesaid, or such other sum as the petitioner's claim for costs might, when so taxed or ascertained as aforesaid, be certified to amount to; and that it might be ordered that no portion of the fund of 5152*l.* 6*s.* Bank Annuities and 74*l.* 1*s.* 3*d.* cash then standing in court to the credit of the causes might be paid out to the said Thomas Parry, either for costs or otherwise, without notice to the petitioner.

Three suits, *Tardrew* v. *Howell* and *Parry* v. *Howell*, were instituted for the administration of the estate of David Howell deceased.

On the 19th January last, an order was made on further consideration by the Vice-Chancellor in all the

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TARDREW v. HOWELL.

Statement.

causes, whereby it was among other things declared that certain sums of money therein specified, and which formed part of a gross sum of 5152*l.* 6*s.* Bank Annuities then standing in court to the credit of the said causes, were subject to certain charges thereon in favour of the plaintiff Thomas Parry; and it was ordered that no part of the said sum should be sold or dealt with without notice to the plaintiff Parry. It was at the same time referred to the taxing master to tax all parties their costs not already provided for, and such costs when taxed were ordered to be paid in manner therein mentioned. It was also ordered that what should be certified to be due to the several creditors named in the chief clerk's certificate (of whom the plaintiff Parry was one) should be paid to the respective persons therein certified to be entitled to receive the same in manner therein mentioned.

The petition further stated, that on the 14th February, 1854, the defendant Howell obtained an order to change his solicitor by appointing Mr. Edward Towsey as his solicitor in the place of a Mr. Thomas, and the petitioner succeeded to Mr. Towsey's business under an arrangement dated the 29th December, 1856.

On the 26th February, 1859, the plaintiff Parry obtained an order to change his agent by appointing the petitioner as such agent in the place of Mr. John Williams.

From thenceforth Mr. Towsey, of the firm of Towsey and Lett, and the petitioner, were successively employed to defend the suits as solicitors for the defendant Howell, and the petitioner was also employed to prosecute the third suit as agent for Mr. Parry; and as it was alleged, it was always understood that they were respectively in effect only to act as agents of Thomas Parry in the business as well for the defendant Thomas Howell as for the plaintiff himself.

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Statement.

On the 15th April last Mr. Parry obtained an order for liberty to act in the causes in person, instead of appearing by the petitioner as his agent, and on the 4th May he obtained an order for liberty to act as solicitor for the defendant Howell in place of the petitioner.

The petition alleged that the costs of the defendant Howell incurred during the time the petitioner acted as his solicitor exceeded 200*l.*, and the proportion of such costs due to him as London agent of Mr. Parry exceeded 100*l.*; that the costs of the plaintiff Parry incurred during the time when the petitioner acted as his agent exceeded 100*l.*, and the proportion to which the petitioner was entitled as such agent exceeded 50*l.* The petitioner had also acted in various other suits and matters as the London agent of Mr. Parry, and he had received from him or on his account various sums of money, some of which were, at the time of payment, expressly appropriated to particular accounts, but by far the greater portion of them were paid and received without any specific appropriation, and were carried by the petitioner to the general agency account current between him and Mr. Parry; and on the 15th January last, when the last bill of costs and general account were delivered, the balance due to the petitioner as such agent at foot of the general account amounted to 86*l.* 10*s.* 5*d.* The agency bill of costs in respect of which this balance was due had been already referred for taxation to one of the masters of the Court of Queen's Bench, and the taxation was not then concluded. The petitioner alleged that a further balance was due to him in respect of the agency bill from the 15th January, which had not yet been delivered.

The petitioner claimed to be entitled, as against the plaintiff Parry, to a charge for the said sum of 86*l.* 10*s.* 5*d.* upon all sums of money or other property which might be or become payable to the plaintiff Parry in the suits,

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or any of them, either in respect of the costs by the said order on further consideration ordered to be taxed or otherwise. The petitioner further said he was desirous (if the Court should think fit) that the result of the taxation in the Court of Queen's Bench should be adopted as the measure of his charge, with such modification (if any) as the Court should direct.

The petition was supported by an affidavit of Mr. Lett, the petitioner, verifying the allegations of the petition, and prayed as follows:—That such order might be made for the adoption of the result of the said taxation as the measure of the petitioner's claim for costs, exclusive of the costs of and incident to this petition, and for the taxation of such costs, or for such taxation or other determination of the amount of such costs, including the costs of this petition, and that it might be declared that the petitioner is entitled to a charge on all sums of money and other property recovered or preserved in these suits or any of them, or payable to the said Thomas Parry, for costs or otherwise in respect of any order made or to be made therein for the said sum of 86*l.* 10*s.* 5*d.*, together with the costs of and incident to this petition, or such other sum as the petitioner's claim for costs may when taxed be certified to amount to; and that it might be ordered that no portion of the 5152*l.* Bank Annuities and 74*l.* 1*s.* 3*d.* cash now standing to the credit of these causes might be paid out to Thomas Parry for costs or otherwise without notice to the petitioner.

On behalf of the respondent Parry, an affidavit was produced by Mr. Ranger, his managing clerk, to the effect that in February last the petitioner wrote to Mr. Parry refusing to act any longer as his agent, and that the petitioner afterwards commenced an action against Mr. Parry for special damages for not giving him the

whole of his agency business, and in the particulars of his demand claimed 86*l.* 10*s.* 5*d.*, the entire balance of his agency bills. That on the 12th of March the deponent, acting on Mr. Parry's instructions, obtained an order for the taxation of these bills. Mr. Ranger further deposed that the amounts stated to be due to the petitioner had all been charged in his former agency bills, and but a very small portion of the costs in *Tardrew* v. *Howell* and *Parry* v. *Howell* were contained in the present agency bills now under taxation. The former agency bills had all been paid and settled. There would be no further bill or bills of costs due to the petitioner, his last bill having been delivered shortly after he wrote refusing to act any longer for Mr. Parry; and the only legitimate claim the petitioner could have against Mr. Parry was the balance of the last three bills, being 86*l.* 10*s.* 5*d.*; and until the completion of the taxation it was doubtful if any amount would be coming to the petitioner until the Master had made his certificate. The present solicitor of Mr. Parry deposed that already a considerable sum had been taxed off the bills, and he believed the amount due from Mr. Parry would be reduced to a very few pounds.

The petitioner in reply denied that the amounts stated in his affidavit to be due to the petitioner had been charged in former agency bills.

The petition came on for hearing on the 19th of July, and stood over on Mr. Parry undertaking to give notice to Mr. Lett when the certificate of taxation was completed.

In a further affidavit, filed on the 25th of October last, the petitioner said that, with reference to the agency bill mentioned in paragraph nine of his affidavit, the same had been delivered up to the 21st of July last, and that on the 3rd of September he commenced an action for the

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recovery of the former balance due to him, amounting to 27*l.* 8*s.* 6*d.*

Statement.

In an affidavit filed on the day when the petition came on, Mr. Ranger deposed that Mr. Lett was now fully secured in the amount of 86*l.* 10*s.* 5*d.* by an agreement entered into by a Mr. George Thomas. Further, that he was secured in respect of what costs (if any) should be found due to him in respect of his further agency account, by an order of Mr. Justice Keating, made on the 3rd of September, which was in the following terms: "Q. B.—*Davies* v. *Bowen.* Upon hearing counsel on both sides, and upon reading the affidavit of E. Lett, Thomas Parry, and Thomas Frederick Ranger, I do order that Mr. Lett be entitled to a charge upon the damages and costs recovered in this action in respect of his bills of costs, the amount thereof to be ascertained by the order made in the action of *Lett* v. *Parry* (third action now before the Master), and also in respect of his further bill of costs (if any) in the fourth action of *Lett* v. *Parry.* No costs for either party. I certify for counsel."

Argument.

Mr. *A. E. Miller*, for the petitioner, contended that under the 28th section of the Act 23 & 24 Vic. c. 127, the Court had power to charge the property realized in the suit (*a*).

(*a*) The 28th section is as follows:—"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney

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Argument.

Mr. *Nalder*, on behalf of Mr. Parry, contended that the Court had no jurisdiction to make the order where the property realized or to be realized was not ascertained, or where it was not shown clearly that some specific amount was due to the petitioner. The statute was intended to apply only as between solicitor and client, and had no application to a claim by the town agent of a solicitor against his principal. But further, the evidence in this case showed that the petitioner had ample security for what, if anything, should be found due to him.

Judgment.

The VICE-CHANCELLOR declared that the petitioner was entitled to a charge in the terms prayed by the petition, and directed an inquiry as to what sum, if anything, remained due to the petitioner from Mr. Parry in respect of his bills of costs in the three suits of *Tardrew* v. *Howell* and *Parry* v. *Howell*.

or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order for taxation of and for raising and payment of such costs, charges, and expenses out of the said property," &c.

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December 10.

HUDSON *v.* GRENFELL.

Exceptions to answer, in which the defendant alleged as a reason for not answering fully, that part of the interrogatories were unsupported by corresponding statements in the bill, and were copied from interrogatories in an action at law, which the defendant had answered, and to which he craved leave to refer.—Allowed with costs.

Instead of answering as to documents the defendant alleged that he was ready to make a full and complete answer on a summons at chambers, to which the plaintiff excepted.—Exceptions allowed with costs.

THIS bill was filed by Benjamin James Hudson, on behalf of himself and all other the unpaid creditors of the late Charles William Grenfell, who should come in to contribute to the expenses of the suit, against Charles Pascoe Grenfell and Georgiana Caroline Grenfell, as representatives of Charles William Grenfell.

Charles William Grenfell died in the month of April, 1861, intestate.

The bill stated that the intestate was at the time of his death indebted to the plaintiff in a sum of 2000*l.* on a promissory note, and prayed that the defendant C. P. Grenfell might admit assets sufficient for the debt of the plaintiff and costs, and the costs of the suit, and that the defendant might be ordered to pay such principal, interest, and costs, or, in default, for administration; and that the defendant Georgiana C. Grenfell might account for the assets of the intestate received by her as executrix *de son tort.*

The defendant C. P. Grenfell, in his answer, after stating that the plaintiffs had on the 17th June last commenced an action against himself and his co-defendant in the present suit in respect of the said debt of 2000*l.*, proceeded as follows:—

"A considerable portion of the interrogatories filed in this suit are not only unsupported by any corresponding statement in the body of the bill, but appear to have been copied almost word for word from the interrogatories delivered in the said action at law; and in particular the last thirteen lines of the third interrogatory in this suit are almost identically the same as those of the

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said third interrogatory in the action at law; and the fourth interrogatory in this suit is almost *verbatim* the same as the fourth and fifth of the interrogatories in the said action; and the sixth interrogatory in this suit is almost *verbatim* the same as the ninth interrogatory in the said action. And I am advised that I am not bound to answer the said interrogatories which relate to matters respecting which the bill contains no corresponding statement; but if this Honourable Court shall consider that I am bound to answer the same, then I crave leave to refer to my answer to the said interragatories at law, which answer was delivered to the plaintiff's attorney in the said action on or about the 29th July, 1861.

In the answer to that part of the interrogatories relating to documents, the defendant answered as follows:—

"In answer to the eighth, ninth, tenth, and eleventh of the said interrogatories, filed in this suit, I say I am ready to make a full and complete discovery as to documents upon a summons being taken out by the plaintiff at chambers according to the usual practice, and under these circumstances I abstain from further answering the said last-mentioned interrogatories in this my answer."

The plaintiff excepted to the answer as insufficient. Exceptions were also taken to the answer of the co-defendant Georgina Caroline Grenfell, which contained paragraphs similar to the above.

Argument.

Mr. *Swanston*, for the plaintiff, supported the exceptions, and submitted the answers were clearly insufficient.

Mr. *Bacon* and Mr. *O. F. Haynes*, for the defendant, contended that the Court would not allow executors or representatives to be vexatiously harassed. The defen-

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dants had already put in a full answer at law, and ought not to be required to answer again.

Argument.

As to the documents, it is unusual now to insert the former interrogatory, as the information is obtained more cheaply and early at chambers.

Judgment.

THE VICE-CHANCELLOR:—

The answers are clearly insufficient, and the exceptions must be allowed with costs. I highly disapprove of the course taken by these defendants, and I hope it will not be imitated.

Re THE TRUSTEE RELIEF ACTS.
Re CHARLES GREENWOOD'S WILL.

Dec. 13.

Bequest of a fund to trustees to pay the interest as M. A. should appoint; and in default of appointment, to her separate use for life, remainder to her husband and children; and in case she should have no child who should live to take a a vested interest, then on trust to assign and transfer the securities unto such persons as should happen to be testator's next of kin according to the Statute of Distribution.—*Held* that the next of kin at the death of the tenant for life took as joint tenants.

THIS was a petition under the Trustee Relief Act by Charles Greenwood, Powis, F. F. Greenwood, E. Greenwood, and L. Greenwood, praying that a sum of 2000*l.*, arising under the will of Charles Greenwood, and which had been paid into Court, might be divided into sixteen shares, and that it might be declared that eight of such shares were payable to Charles Greenwood, the petioner, and one-sixteenth to each of the children of Thomas Greenwood.

Charles Greenwood, sen., by his will, dated the 11th of February, gave to his son-in-law William Stephens and the petitioner Charles Greenwood 2000*l.* and interest from his death, upon trust that they, his said

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trustees, or the survivor of them, or the executors or administrators of such survivor, should lay out and invest the same, and pay the interest, dividends, and annual produce unto such person or persons as his daughter Mary Ann should, during her life, whether covert or sole, order or direct, but not by way of anticipation; in default of such appointment, to her separate use for life, and after her decease for her husband and children as therein mentioned, and the testator then made the following disposition:—

"And upon further trust that in case my said daughter Mary Ann shall not have any child or children, or, there being one or more, and none of them shall live to attain a vested interest in the said stocks, funds, and securities, then *to assign and transfer* the said stocks, funds, and securities and all accumulations, if any, of the interest and dividends thereof, *unto such person or persons* as shall happen to be my next of kin according to the statute for the distribution of intestates' effects."

He appointed the petitioner Charles Greenwood and William Stephens executors of his will.

The testator died on the 3rd of February, 1835, and the 2000*l.* was invested and paid into court under the Trustee Relief Act. The testator's daughter, Mary Ann Greenwood, died on the 20th of December, 1860, never having been married.

At the testator's death his next of kin were his four children, Charles Greenwood the petitioner, Thomas Greenwood, Ann Phillis Stephens, and Mary Ann Greenwood.

Thomas Greenwood died on the 8th November, 1846, leaving eight children, of whom four were petitioners, and the other four infants. Ann Phillis Stephens died on the 24th April, 1856, having survived her husband, but leaving no issue.

At the death of Mary Greenwood the next of kin of

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the testator were Charles Greenwood and the eight children of Thomas Greenwood.

The representatives of the deceased children of Charles Greenwood opposed the petition on the ground that the class was to be ascertained at the death of the testator, and that they took as tenants in common, upon which construction the children of Charles Greenwood would be entitled to share.

Mr. *Malins* and Mr. *Martindale* contended, in the first place, that by using the words "next of kin" the testator meant next of kin at the death of the tenant for life. By any other construction he might have given it absolutely to the tenant for life if she happened to be his next of kin at his death: *Briden* v. *Hewlett* (*a*). In *Butler* v. *Bushnell* (*b*), the Master of the Rolls used this language:—"Where a testator gives property to a person for life, with remainder to his children; and if he should die without children, then over to his next of kin; it is not a probable contention that he should mean to include as one of his next of kin the person upon whose death without issue he has expressly directed that the property should go over." In *Urquhart* v. *Urquhart* (*c*), the Vice-Chancellor of England recognised the principle of these cases, though he decided that in that case the testator referred to the period of his own death. *Wharton* v. *Barker* (*d*) was also an authority in support of the same principle. Secondly, they contended that the next of kin took as a class in joint tenancy. *Withy* v. *Mangles* (*e*), *Baker* v. *Gibson* (*f*), *Lucas* v. *Brandreth* (*g*), were also cited.

Mr. *C. Hall*, for the representatives of the deceased

(*a*) 2 M. & K. 90.
(*b*) 3 M. & K. 232.
(*c*) 13 Sim. 613.
(*d*) 4 K. & J. 483.
(*e*) 4 Beav. 358; S. C. 10 Cl. & Fin. 215.
(*f*) 12 Beav. 101.
(*g*) 28 Beav. 274.

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children, contended, first, that the testator's "next of kin" meant next of kin at the period of the testator's death; and, secondly, that they took as tenants in common.

The reference to the statute not only determined the parties, but also the title by which they were to take. In the case of *Horn* v. *Coleman* (*a*), where the words were very like these, his Honour took that view.

Argument.

Mr. *C. M. Roupell*, on behalf of Ann Elizabeth Greenwood, also contended that "next of kin" meant next of kin at the death of testator, and that such next of kin took as tenants in common.

Judgment.

The VICE-CHANCELLOR:—

In the case of *Horn* v. *Coleman*, the testator referred to the statute in such a manner as showed that he intended not only to denote the persons who were to take, but also that they were to take according to the title given by the statute.

Here the words are "to assign and transfer" the fund "to such person as shall happen to be" the testator's next of kin—namely, to four persons. How can that be done except by transferring and assigning to them as joint tenants? There are no words to show that they are to take in the same manner as if they were entitled under the statute. There are no words of severance to be found here—no words showing an intention to make a severance.

On the other point the case seems to be concluded by the decisions in *Briden* v. *Hewlett* and *Butler* v. *Bushnall*, which have been followed in subsequent cases.

The declaration, therefore, will be, that the petitioners are entitled as joint tenants; the costs of all parties to come out of the fund.

(*a*) 1 Sm. & G. 169.

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Dec. 19*th*.

WILKINSON *v.* LEWIS.

A plaintiff resident abroad is not compelled to give security for costs where the bill is filed by way of defence to an action at law, although it seeks other relief.

THIS bill was filed by John Fenwick Wilkinson, described as "late of No. 23, Durham Terrace, Westbourne Park, Paddington, in the county of Middlesex, but now at the colony of Natal, South Africa, Esquire."

The bill alleged that the plaintiff had employed the defendant, as his agent and solicitor, to manage an estate called Sharragh, situate in the county of Tipperary, and to collect and receive the rents, to make certain payments thereout, and to remit the balance to the plaintiff, receiving 5*l.* per cent. commission for agency on the amounts received in full of all charges and expenses.

The bill alleged that from the commencement the defendant was very irregular and dilatory in furnishing the accounts; that the accounts were irregular; that he had on the sale of the estate given up to the purchaser the rents, amounting to 130*l.*, which had accrued due within a few days after the date of the contract, but before its completion. The bill also alleged that the defendant had not allowed the plaintiff the full amount of the proceeds of the bills discounted, and also alleged that the defendant had charged the plaintiff with monies advanced to the plaintiff's wife after her separation, and without his authority.

The bill also alleged that the commission of 2*l.* 10*s.* per cent. was only payable in case the estate sold for 7500*l.*, which it did not by reason of the defendant's giving up the back rents; but alleged that the defendant, in April, 1859, had commenced an action against the plaintiff to recover a sum of 272*l.* 7*s.* 10*d.*, which was composed of a sum of 174*l.* 7*s.* 10*d.*, the alleged balance due on the account, and of two other sums.

The plaintiff thereupon filed a bill for an injunction to

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restrain the action, and praying that an account might be taken of all dealings and transactions of the defendant as the plaintiff's agent; and that in taking such account the defendant might be charged with all monies received by him on the plaintiff's behalf, and with all monies which but for his wilful neglect he might have received; and with all such loss as should appear to have been sustained by reason of the defendant's neglect to recover the rents of the Sharragh estate which accrued due prior to the 1st of May, 1860; and that he might be disallowed the commission on the sale of the Sharragh estate.

Statement.

It appeared from the evidence that the plaintiff in equity, in consequence of the plaintiff at law being resident in Ireland, obtained security for costs. The defendant in equity also, the plaintiff being resident in Natal, obtained an order of course requiring the plaintiff to give security for costs.

Argument.

Mr. *Bacon* and Mr. *Freeling* now moved to discharge that order as irregular. This bill was filed as a defence to the action at law commenced by the defendant, and the case was therefore within the decision of *Watteeu* v. *Billam* (*a*), in which Vice-Chancellor Knight Bruce, after consulting Lord Langdale and Sir J. Wigram, held, where a bill is filed for the purpose of defence the rule as to security for costs does not apply.

Mr. *Malins* and Mr. *De Longueville Giffard*, for the defendant, contended that the exception to the general rule applied only to cases where the bill was strictly a defence. The principle was, that a defendant who is not a volunteer ought not to be made to give security for costs; but that did not extend to cases in which the bill, though in one respect defensive, asks for substantial

(*a*) 3 De G. & S. 516.

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Argument.

relief. In this case the bill asked to charge the defendant with the loss of the rents of the Sharragh estate, and was in the nature of an action for consequential damages. In *Vincent* v. *Hunter* (*a*), Vice-Chancellor Wigram stated that the grounds of the exception to the general rule were, that the bill was a mere defence.

Judgment.

THE VICE-CHANCELLOR:—

It is perfectly true that this bill asks more than is necessary for the mere defence to the action at law commenced by the defendant. But that does not take the case out of the well-settled principle of the Court, that where a bill is filed, as here, by way of defence, the plaintiff being out of the jurisdiction, the plaintiff is not required to give security for costs. The order, therefore, must be discharged with costs.

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Jan. 13*th.*

NORRIS *v.* JACKSON.

A tenant having entered into possession of a farm, and expended moneys under an agreement that the landlord would grant a lease for twenty-one years, and make such improvements and repairs as he and the landlord should jointly agree—*Held*, on demurrer, that the stipulation as to repairs was not of the essence of the agreement, and that the impossibility of the strict performance of that stipulation in consequence of the death of the landlord was no sufficient reason for allowing a demurrer to a bill for specific performance, where the plaintiff had so long a possession, and had expended money on the faith of the agreement.

IN the summer of 1850, A. B. Cook, the owner in fee of the hereditaments in question in this suit, entered into an agreement with the plaintiff, which was in the following terms:—

"Memorandum of an agreement made and entered

(*a*) 5 Hare, 320.

into this 6th day of August, 1850, between A. B. Cook of the one part, and James Norris of the other part, whereby it is agreed that the said A. B. Cook, his heirs or assigns, shall, on or before the 2nd day of November now next ensuing, make and execute unto the said J. Norris, his executors, administrators, or assigns, a good and valid lease at their mutual expense of all that messuage or tenement and farm called Gostling's Hall, with the outbuildings, lands, hereditaments, and appurtenances thereto belonging, together with the cottages occupied therewith, all situate in Debenham aforesaid, and the land containing altogether by recent admeasurement 242 acres or thereabouts, and also all that messuage or tenement and windmill, with the warehouse, outbuildings, land, hereditaments, and appurtenances thereto belonging, situate in Debenham aforesaid, together also with the going gear, machinery, trade and other fixtures belonging to the said windmill (which said messuages or tenements and farm, windmill, land, hereditaments, and premises have been lately purchased by the said A. B. Cook of the trustees of the will of the late Dr. Chevallier), for the term of twenty-one years from the 11th day of October next, at and under the yearly rent of 440*l.*, payable half-yearly, on the 11th day of October and the 6th day of April in each year, clear of all deductions for taxes or on any other account whatsoever (except land tax, landlord's property tax, and quit and free rents), and subject to all such covenants as are usual and customary in leases of property of the nature hereinbefore agreed to be let on the part of the said J. Norris, his executors, administrators, and assigns, except so far as the same may be contrary to the provisions hereinafter contained. And it is hereby expressly agreed that the said J. Norris, his executors, administrators, or assigns, shall be authorized by the said lease to use, cultivate, and manage all the lands hereby agreed to be demised in such shifts or

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course of husbandry, and generally in such manner in all respects as he or they shall in his or their irresponsible and absolute discretion think proper, and for the improvement of the property, except during the last year of the continuance of the said demise, when he or they shall use, cultivate, and manage the arable lands according to the four-course system of husbandry, and so deliver up the same. And it is also agreed that the said J. Norris, his executors, administrators, or assigns, shall have power, with the previous consent in writing of the said A. B. Cook, his heirs or assigns, or his or their agent, to break up all or any part of the meadow or pasture lands hereby agreed to be let, and to remove and break down such hedges and fences as the said J. Norris, his executors, administrators, or assigns shall think fit, and that the said lease shall contain a proviso that it shall be lawful for the said A. B. Cook, his heirs or assigns, at any time, and from time to time during the continuance of the lease, if any railway shall be made through the said lands hereby agreed to be let, to take any part of the lands hereby agreed to be demised (not exceeding twenty acres in the whole, and so that the lands so taken do not interfere in any way with the personal enjoyment or occupation of the said dwelling house), he or they allowing an abatement or reduction from the said rent of 440*l.*, at the rate of 1*l.* 13*s.* for every acre of land which shall be taken by the said A. B. Cook, his heirs or assigns, and so in proportion for any less quantity than an acre, and also a proviso that it shall be lawful for the said A. B. Cook, his heirs or assigns, in case he or they shall be desirous of pulling down the said cottages hereinbefore agreed to be let, and shall give up the site thereof to the said J. Norris, his executors, administrators, or assigns, to erect and build other cottages as convenient in all respects as those to be taken down, on other part of the said lands hereby agreed to be demised as may be

mutually approved of, and such new cottages when completed to be given up to the said J. Norris, his executors, administrators, or assigns, as included in this agreement. Provided that it shall not be in any way obligatory or binding upon the said A. B. Cook, his heirs or assigns, to build cottages which shall realise the same amount of rental as was payable in respect of the cottages which shall be so pulled down. And the said A. B. Cook doth hereby agree on or before the 11th day of October, 1851, to put the said messuage or tenement called Gostling's Hall into a good and sufficient state of repair, *and in making such additions thereto, and alterations and improvements therein, and in putting such tenant's and other fixtures therein, and in erecting suitable and sufficient coach houses and stables as the said J. Norris and A. B. Cook shall jointly agree upon*, to the intent that the same dwelling house and other premises may be made fit in all respects for the use and occupation of the said J. Norris and his family and servants. And the said A. B. Cook doth also agree, at his own expense, to put the said windmill and the dwelling house and premises occupied therewith, and also the stones going and other gear and machinery connected therewith into a properly efficient state and condition in all respects on or before the said 6th day of April, 1851, and also on or before that day, at his own expense, to put all the other buildings not comprised in the foregoing stipulations, with all the gates, hedges, and fences on the said premises, into a proper and complete state of repair in all respects. And the said J. Norris doth hereby agree that after the full and due performance by the said A. B. Cook of the several foregoing stipulations on his part, he, the said J. Norris, will accept of the said lease, and execute a counterpart thereof, and thereby agree to keep up the said dwelling house, mill, other buildings, and premises in a good and tenantable state of repair during the continuance of the

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said lease, being allowed good and sufficient rough timber and other materials for the purpose in the usual and customary way, damage by fire, storm, and tempest being excepted. And the said J. Norris doth hereby agree to take by valuation the articles and effects now in and about the said windmill and the premises occupied therewith, which the said A. B. Cook has agreed to purchase with the said premises, and which are mentioned in a certain inventory signed by the said parties hereto, or such of them as are now upon the premises."

On the 11th of October, 1850, the plaintiff took possession of the farm, and in October, 1851, possession of the messuage called Gostling Hall. During the period between the plaintiff taking possession and the sale by A. B. Cook to the defendant Jackson in 1857, disputes and negotiations of a lengthy and complicated description took place between the plaintiff and Cook respecting the repairs, additions, and improvements stipulated to be performed by A. B. Cook, in consequence of which no lease was ever granted, but the plaintiff continued in possession, and paid without prejudice the rent of 440*l.* stipulated to be paid.

In 1857 the said A. B. Cook sold the farm, &c., to the defendant Jackson, who, as a part of the same transaction, mortgaged it to the defendants Lloyd and Echalaz.

The bill alleged that at the time of the sale and mortgage the defendants were aware of the agreement, and the plaintiff's interest thereon, and on the occasion of the purchase the said A. B. Cook allowed the defendant Jackson to make a deduction from his purchase-monies. The defendant Jackson gave A. B. Cook an indemnity against the plaintiff's claim.

The bill alleged that subsequently to the sale disputes and negotiations took place between the plaintiff and the defendant Jackson relative to the repairs, additions, and

improvements, and Jackson employed one Benjamin Rix, of Ipswich, to inspect the premises, who, in 1857, recommended very considerable repairs as being immediately necessary, and, as the plaintiff believes, stated his opinion that other and more extensive repairs were necessary, but the said defendant refused to let the plaintiff see the said report, or to supply him with a copy.

A. B. Cook died in November, 1859, having appointed C. S. Webber and William Jones his executors.

On the 6th of November, 1860, the plaintiff filed his bill against the defendant Jackson, and against C. S. Webber and W. Jones, stating in substance as heretofore, and also stating that the said Webber and Jones were prosecuting an action at law to recover certain rent claimed to be due from the plaintiff, and praying—

First, that the defendants, or some or one of them, might be decreed to put Gostling Hall into a good and sufficient state of repair, in making additions thereto, &c. &c., that the same might be fit for occupation, &c. &c.

Secondly, that the defendant might be decreed to put the windmill in repair, and cottages, fences, &c.

Thirdly, that the defendant Jackson might be decreed to grant a proper lease.

Fourthly and fifthly, that the defendants, or some or one of them, might be ordered, in substitution for such relief, to pay the plaintiff damages by reason of non-performance of the said agreement, and costs and damages by reason of the non-performance of the said agreement by Cook.

Sixthly, that an account might be taken of monies expended by the plaintiff in works that ought to have been done by A. B. Cook or the defendant Jackson.

Seventhly, that, unless Webber and Jones should admit assets, accounts might be taken of A. B. Cook's estate, and for an injunction to restrain the action and for further relief.

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The defendant Jackson filed a general demurrer to the bill for want of equity and for multifariousness. C. S. Webber and W. Jones also put in a joint demurrer for want of equity. In December, 1860, Vice-Chancellor Wood allowed both demurrers.

The eleventh paragraph of the bill was as follows:—

His Honour Vice-Chancellor Wood in his judgment on allowing the said demurrers, after observing that the plaintiff had not agreed to accept a lease except upon the said Arthur Bott Cook performing that which by the statements in the bill had not been performed, and that the plaintiff was wholly free unless those stipulations were performed, added that he (the Vice-Chancellor) must see whether there was such an agreement as the Court could be called upon to effect, it being impossible for Cook to agree, he being dead; and after expressing an opinion that there would be no difficulty if the plaintiff waived the particular stipulations dependent upon the joint agreement of the plaintiff and Cook, the Vice-Chancellor, in the conclusion of his judgment, expressed himself, as appears by a transcript of the notes of a short-hand writer, in the words following, that is to say:—

"Unfortunately the parties could not agree, and he alone who could come to an agreement is dead; therefore the possibility of arriving at any agreement between them is at an end, and the only point that was pressing upon me was one rather more of form than of substance, because I take it the parties wish to have my opinion as far as that can guide them upon the substance. The only point of form was this, that whereas it appears this gentleman would be entitled to a lease if he waived the agreement, he says, 'Give me damages.' If I think he is not entitled to any damages at all, and still he is entitled to a lease, then there would be something for the Court to act upon by way of specific performance. But I do not think the plaintiff is entitled to a lease,

unless he makes a distinct offer to waive any part of that arrangement. It is not like the case of an agreement signed by one party and not by the other. He does not bind himself here by the filing of his bill to take any lease at all, except with these conditions; therefore it is unilateral; he not being bound, still he asks to bind these gentlemen, who cannot be bound, as it appears to me, unless he is content to take a lease without any arrangement being made with reference to those conditions which are now incapable of being performed.

"There is another point in which this case differs from *Soames* v. *Edge*, because in that case it appeared there was an agreement to do two things, an agreement to build, and the plaintiff there was asking to have the agreement performed. The plaintiff agreed to grant a lease upon the other party building, and he agreed to build to the satisfaction of the plaintiff's surveyor. The plaintiff says, 'I ask for damages upon that right, and then I will grant the lease.' Here that is not the case. To make the case similar it should be this—that the party who is called upon to grant the lease should be the person who has got a contract from the other side to do such and such works, and he says, 'Give me damages on that part of the contract, and let me have the rest simply upon the agreement by specific performance.' It appears to me that there is no contract here with reference to the repairs that can now be performed, no agreement ever having been come to between Cook and the other party—no contract which binds the plaintiff to take any lease at all; and unless one has a distinct waiver on the part of the plaintiff, the bill is one against which a proper defence can be made by way of demurrer."

The bill alleged that, it having been decided in the former suit that the plaintiff could not claim the full and entire performace of the said memorandum of agreement,

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and the defendant William Jackson having, in March, 1861 (on behalf of the other defendants as alleged, as well as on his own account), given the plaintiff notice to quit, on the 11th of October, 1861 (treating the plaintiff as yearly tenant), it became necessary for the plaintiff to decide whether he would abandon the agreement altogether or waive the particular stipulation which by the death of Cook had become incapable of being performed. He decided on waiving the particular stipulations, and after some delay, on the 18th of July, 1861, wrote to the defendant as follows:—

"To Mr. William Jackson,—I, the undersigned James Norris, of Debenham, in the county of Suffolk, do hereby give you notice that I require you to grant to me a lease of the messuage or tenement and farm called Gostling Hall, with the outbuildings, lands, hereditaments, and appurtenances thereto belonging, together with the cottages occupied therewith, all situate in Debenham aforesaid, the land containing altogether by admeasurement 242 acres, or thereabouts, and also of the messuage or tenement and windmill, with the warehouse, outbuildings, lands, hereditaments, and appurtenances thereto belonging situate in Debenham aforesaid, near or adjoining the same farm, pursuant to the agreement dated the 6th day of August, 1850, made between the late Arthur Bott Cook of the one part, and myself of the other part. And I am willing and hereby offer to accept the said lease, and to execute a counterpart thereof, and also to bear my proper expenses of such lease and counterpart, waiving all such conditions and stipulations in the said agreement which are now incapable of being performed. And I require you to forward to me a draft of such lease for approval, and in default of your compliance with this demand I further give you notice that

it is my intention to file a bill in the High Court of Chancery against you to compel you to grant to me such a lease. Dated this 18th day of July, 1861.

"JAMES NORRIS."

On the 14th of August, 1861, the plaintiff in reply received the following letter from the defendant's solicitor:—

"Ipswich, 14th of August, 1861.

"Dear Sir,—In pursuance of the notice to that effect dated the 18th of July last, and addressed to Mr. Wm. Jackson, I have, under his instructions, prepared a lease of the properties comprised in the agreement between the late Mr. A. B. Cook and yourself, and dated the 6th August, 1850, omitting all such conditions and stipulations in the said agreement as are now incapable of being performed, and by book post I beg to forward the draft of the lease for your perusal and approval. In thus complying with the terms of your notice of the 18th July, I must beg you distinctly to understand that Mr. Jackson has done so, and that the draft is now sent, without prejudice to the exercise of the right to determine the tenancy at the end of the current year pursuant to the notice to that effect which was served upon you previously to Lady Day last, and to take such other proceedings as he may be advised in connection with it.

"I am, yours faithfully,

"HASELL RODWELL.

"J. Norris, Esq., Debenham."

The draft lease was obtained by the plaintiff, and submitted by him to a conveyancing counsel, who made certain alterations, to which the defendant would not agree; and on the 7th November, 1861, they commenced

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an ejectment against the plaintiff. On the 11th November, 1861, Mr. Taylor, the plaintiff's solicitor, wrote to Mr. Hunt, the town agent of the defendant's solicitor, the following letter:—

"7, Gray's Inn Square,
"Monday, 11th November, 1861.

"Dear Sir,—On behalf of Mr. Norris, I am most anxious (more especially with reference to the concluding remarks in your letter of the 7th inst.) to prevent the impending litigation from being either caused or complicated by any possible misunderstanding by him of the allegations of right by Mr. Jackson and his mortgagees, in connection with the demand by Mr. Norris of a lease, under the agreement of 6th August, 1850.

"I therefore enumerate those allegations as understood on the part of Mr. Norris.

"1st.—Your clients deny that they are bound to grant any lease to Mr. Norris, such denial being wholly irrespective of any particular stipulations to be contained in the lease, and of the waiver by Mr. Norris of such stipulations by Mr. Cook as are now incapable of being performed.

"They allege that, even if this were otherwise, they are entitled to

"2ndly.—Reservations of exclusive rights of sporting with covenants for the protection and enjoyment of the game.

"3rdly.—A covenant prohibiting an assignment or underletting without the consent of the landlord.

"4thly.—A reservation of the timber, with the consequent rights of felling, &c.

"5thly.—A general covenant by Mr. Norris for the repairs of the buildings and other parts of the farm, during the continuance of the term.

"The first three points are questions of equitable construction; they are of practical importance to Mr. Norris, and, under the advice which he has received that that he is right in his views as to them, he cannot waive them.

"The fourth, also, he is advised, could be successfully resisted by him; but this is a subordinate point, which (as previously stated) he is willing to yield, if the lease were otherwise satisfactorily settled.

"The fifth (the assertion of which certainly seems inconsistent with Mr. Rodwell's letter of the 16th October) appears to involve simply an issue of fact, it having been distinctly admitted by the counsel of Mr. Jackson and his mortgagees, at the recent consultation at Mr. Hedge's chambers, that the obligations on the part of Mr. Norris to keep in repair were dependent upon the performance of Mr. Cook's obligations to put in repair—but it was also alleged that, as matter of fact, such obligations had been performed—such performance it denied by Mr. Norris.

"Such, I believe, to be a correct statement of the issues of law and fact raised by your clients. If I have misstated, or omitted any, be kind enough to inform me.

"I must add, in conclusion, that the particular qualification of the covenant as to repairs which was inserted on behalf of Mr. Norris in the draft lease, was done so when no idea was entertained by him that your clients alleged that the repairs positively undertaken by Cook (apart from any reference to mutual agreement) had been, in fact, executed. And you will understand that if the particular language of that qualification be objected to by your clients, Mr. Norris would willingly consent to any fair alteration of it, his only wish in this respect being to be protected against a greater burthen, as to repairs, than the agreement of 1850 contemplated; and that such protection should be afforded by language,

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or in a manner, as effectual as was provided by the clear terms of that agreement.

"I am, dear Sir, yours faithfully,

"JOHN TAYLOR.

"William Hunt, Esq."

The bill charged that the plaintiff had expended considerable sums on the premises and on the pleasure grounds of Gostling's Hall, and on the faith of being entitled to a lease had farmed in a more expensive way than he would have done otherwise, and had always paid the full rent, &c.

The bill alleged that, after leaving out of consideration the particular stipulations which were made dependent on the joint agreement of the plaintiff and Cook, and which, by reason of Cook's death, were now incapable of being performed, and were distinguished by Italic type, there were other stipulations as to repair which had not been performed either by Cook or Jackson, and in particular Gostling's Hall had never been put into a good and sufficient state of repair, nor the windmill dwelling-house and premises occupied therewith, nor the stones and gates put into a proper state and condition. And the plaintiff charged that the defendant William Jackson ought to be decreed to fulfil the stipulations as to repair in the agreement which were in no wise dependent for their performance upon the joint agreement of the plaintiff, and of the said A. B. Cook, and at all events that the plaintiff ought not to be compelled to enter into any covenant to repair until the said stipulations should have been fulfilled. However, he submitted to enter into such covenant as the Court might think fit.

The bill alleged that the defendants were prosecuting the said action of ejectment, &c., and prayed—

1. That the said action might be restrained by injunction.

2. That, the plaintiff hereby waiving the performance

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of all such conditions and stipulations contained in the said agreement as by the death of Cook had become incapable of being performed, the said agreement (except as to such stipulations, &c.) might be decreed to be specifically performed, and that the defendants might be decreed to execute and procure the execution by all proper parties of a lease in accordance with the terms of the said agreement as modified by the waiver aforesaid.

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3. That the defendant Jackson might be decreed to perform all such repairs as by the agreement were not in any way made dependent on the joint agreement of the plaintiff and the said A. B. Cook, or that the covenant to repair to be entered into by the plaintiff might be made conditional on the due performance of the said repairs, or might be otherwise qualified in such a manner as might appear fair and reasonable.

Argument.

Mr. *Bacon* and Mr. *Rodwell*, for the demurrer.—Whether the plaintiff had or had not taken possession on the faith of the agreement, if he came to this Court and asked for specific performance of the agreement he must waive the specific performance of such of the terms as could not now be performed. The plaintiff must distinctly say, "I waive the performance of that part of the agreement which cannot be performed." At present he, not being himself bound, asks the Court to bind the defendants, and the contract was unilateral. Then came the question whether he had waived the stipulations in the agreement. The plaintiff said he would waive that part of the agreement which related to the fixtures, coach-house, stables, &c. (set out in Italics); but that was not sufficient. [The Vice-Chancellor.—Why should he waive the performance of that which is impossible to be done?] He does not distinctly offer to waive any part of the arrangement; and he asks that the defendant may be decreed to perform

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repairs. [The Vice-Chancellor.—The Court may refer it to chambers to settle the terms of a lease, having regard to the altered circumstances since the death of Cook; but to decree that the defendant should be obliged to perform repairs would be quite another thing. Because the plaintiff asks more than he is entitled to, does it follow that he is entitled to no relief?] — The sole question was a legal one, whether or not the plaintiff was not required by his bill distinctly to waive all those conditions which had become incapable of being performed. This was the precise ground on which Vice-Chancellor Wood had allowed demurrers to the former bill, which was really identical with this.

Mr. *Malins* and Mr. *O. F. Haynes* appeared for the bill, but were only heard as to the costs of that portion of the bill which set out an extract from the judgment of the Vice-Chancellor Wood.

Judgment.

The VICE-CHANCELLOR:—

I think this demurrer must be overruled. The plaintiff states an agreement for a lease in intelligible terms made upwards of ten years ago. He states that, upon the faith of that agreement and in part performance of it, he entered into possession of the farm which it was agreed should be let to him; that he for ten years cultivated the farm, and that he expended money on the faith of obtaining a lease. Having stated so much, I think it is impossible to say, unless there be some other vice in the bill, that, upon these statements, he is not entitled to any relief at all, and that he is to be turned out of court upon this demurrer. The ground of the demurrer is, that the agreement contains a stipulation as to certain repairs in a dwelling-house, coach-house, and offices, the nature of which repairs was to be agreed upon between the plaintiff and Mr. Cook, who has since died. My

opinion is, that that stipulation as to the repairs is not of the essence of the agreement. It is a stipulation which seems, upon the statements in the bill, to be now incapable of being literally performed. My opinion is that, upon a bill for the specific performance of an agreement for a lease containing certain complicated stipulations as to repairs and fixtures, the fact that the stipulations as to repairs and fixtures have become impossible of performance is no answer to the prayer for specific performance of the agreement, where there has been possession and expenditure. In such a case the lease must, of course, be framed with regard to the altered state of circumstances, as it affects those stipulations which are not essential to the agreement. The demurrer must therefore be overruled, and the costs will follow. But with respect to paragraphs nine, ten, and eleven of the bill, I wholly disapprove of the mode of pleading which has been adopted. I wish to convey my sense of the extreme inconvenience of inserting allegations of the language said to be used by a judge in delivering judgment in another case. I shall therefore not allow to the plaintiff the costs of those paragraphs.

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Dec. 10*th*, 11*th*, & 13*th*.

BURDON *v.* BARKUS.

Lessee of coal mines who had long worked on his own sole account, and continued so to work some only of the demised seams of coal, and during the lease admitted a partner in working another of the seams, and afterwards dissolved the partnership. —*Held*, that the partner's interest in the lease was put an end to by the dissolution.

A lease acquired for the purposes of a partnership, whether in the name of one or all of the partners and dedicated to the partnership purposes, forms part of the partnership assets, but where the owner of a lease admits another to be his partner in the use of a part only of the demised property, and afterwards dissolves the partnership, the partner has no longer any interest in the lease.—But the expelled partner was held to be entitled to an allowance in respect of any benefit that had accrued to the lessee in respect of the expenditure of partnership capital.

THIS bill was filed by W. W. Burdon against William Barkus, and it prayed a declaration that the partnership between the plaintiff and defendant was dissolved on the 13th August, 1858. After praying that the partnership accounts might be taken, the bill prayed (3) that in taking such accounts the plaintiff might be allowed the tentale rent of 5*s.* per ton on all coals worked and gotten by the plaintiff and defendant as aforesaid from and after the 26th October, 1854. That (4) it might be declared that the defendant was not nor is entitled to any estate or interest in the said Allerdean Colliery, or in the seams of coal comprised in the said class called the Upper Seams, and (6) that the defendant might be restrained from working, vending, &c., any coal out of the upper seams, and from intermeddling with any of such seams, and from making any contract, &c., in the name of the plaintiff and defendant as co-partners. The following are the material allegations in the bill:—

"Before and during the year 1845 the plaintiff was tenant of the coal mines and seams of coal called Eighton Colliery, otherwise Team Colliery, situate within the manor of Ravensworth, in the county of Durham, with powers of working and getting the said coal mines and

seams of coals and other minerals (including ironstone and fireclay) in and under the said colliery; under a lease thereof granted by Thomas Henry Lord Ravensworth (since deceased) to the plaintiff for a term of years expiring on the 31st day of December, 1848, at a fixed certain yearly rent and at tentale rents for overworkings. According to the usages of the district of Northumberland and Durham, a tentale rent is a rent payable according to the tale or number of tens of coal worked and gotten, and a ten is a measure of coal containing about 18 Newcastle chalds. of 53 cwt. each.

"The seams of coal and mineral (including under the term "mineral" ironstone and fireclay) comprised in the said colliery were and are commonly distinguished by being divided, according to their relative positions, into two classes—one called the Upper Seams, and comprising generally the seams of coal and mineral aforesaid lying nearer to the earth's surface, and the other called the Lower Seams, and comprising generally the seams of coal and mineral aforesaid lying farther from such surface; but notwithstanding this nominal distinction the said two classes, in fact, are closely connected, and in some places in the said colliery one, and in others the other class lies nearer to the earth's surface, and in many places in the said colliery the two classes interlace, or are otherwise intermixed with each other; and for these reasons it was and is impossible, with due regard to profit or economy, to place the working or getting of the two classes under separate and independent management. The said class called the Lower Seams comprised and comprises a quantity of coal and mineral much greater and more valuable than the quantity of coal and mineral comprised in the said class called the Upper Seams, and was and is generally much more important and advantageous for being worked and gotten than the said class called the Upper Seams.

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"Before and in the year 1845 the plaintiff, as such tenant as aforesaid, was working and getting the said class called the Lower Seams, and the defendant was in the plaintiff's service as his colliery agent or viewer at the said colliery, and in or about the same year, and whilst the defendant was in the plaintiff's service as aforesaid, the defendant proposed to the plaintiff that the defendant should have the privilege of opening and working and getting ironstone, fireclay, and coals from the said class called the Upper Seams, in conjunction with the plaintiff, upon the terms of sharing with the plaintiff in the profits derived therefrom, and that for this purpose such opening, working, and getting should be made and carried on by means of a drift or opening into the side of the hill containing such ironstone, fireclay, and coals, and by means of the use of certain railways and other ways then already laid down, and constructed by the plaintiff for the purposes of the said colliery, and that for such use the plaintiff should be paid a way-leave rent of 2*s.* per ten per mile of material carried thereon for the plaintiff and defendant in such proposed opening, working, and getting. The said hill contained a part only of the said class called the Upper Seams. The said proposal of the defendant comprised the opening, working, and getting, in the first instance, of one seam only of ironstone, fireclay, and coal lying under such hill. The principal object of such working was, in the first instance, the working and getting of ironstone and fireclay.

"The railways and other ways laid down and constructed by the plaintiff, and proposed to be used as aforesaid, were so laid down and constructed by the plaintiff at great cost, and the proposed use thereof as aforesaid was equivalent to a saving of upwards of 10,000*l.* of capital in such proposed opening, working, and getting, and the defendant represented to the plain-

tiff, and the plaintiff believed, that, by means of such proposed use of such railways and other ways as aforesaid, such proposed opening, working, and getting could be made and carried on at a very small expense.

"This proposal was shortly after the making thereof accepted by the plaintiff, but no memorandum in writing of such proposal or acceptance, or of any agreement thereupon, between the plaintiff and defendant was ever made or entered into.

"In pursuance of the agreement between the plaintiff and defendant, made by such proposal and acceptance as aforesaid, the plaintiff and defendant in or about the year 1845 commenced and made and carried on such opening, working, and getting by means of such drift and of such use of the said railways and other ways as proposed as aforesaid. One such seam only in the first instance was opened and worked, and afterwards other such seams were from time to time opened and worked as aforesaid.

"Shortly after the expiration, on the said 31st day of December, 1848, of the said term of years granted by the said lease of the said colliery, the plaintiff entered into an agreement with the said Lord Ravensworth for the grant (by way of renewal of the said lease) of the lease stated in the next following paragraph:—

"By an indenture of lease, dated the 13th day of May, 1849, expressed to be made between the said Lord Ravensworth of the one part and the plaintiff of the other part, and duly executed by the said Lord Ravensworth, the said colliery and certain other seams of coal in the indenture now in statement mentioned, being all seams of coal within and under the lands or grounds parcel of the said manor of Ravensworth, distinguished in that behalf in the plan in the same indenture referred to, together with such rights, liberties, powers, and

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authorities as thereinafter specified, that is to say, among other things, to use the then present and to dig and use all such other pits, shafts, mines, and drifts as should be necessary for working and carrying on the said colliery and coal mines, with full power for the making railways for leading away coals, and for building colliery-houses, subject to a reservation to the said Lord Ravensworth, his heirs and assigns, of power to grant way-leaves to persons other than the plaintiff, his executors, administrators, and assigns, over the said railways and premises, on payment therefore to the plaintiff, his executors, administrators, and assigns, of a way-leave rent of 2*s.* per ten per mile of material carried over the said railways and premises, were demised by the said Lord Ravensworth to the plaintiff, his executors, administrators, and assigns, for the term of twenty-five years from the 1st day of January, 1849, at the certain yearly rent of 2000*l.* payable half-yearly as therein mentioned. And by the indenture now in statement it was agreed that in respect of such certain rent the lessee, his executors, administrators, and assigns, might work and get out of the seam called the Low Main or Hutton Seam (included in the said class called the Lower Seams) 1200 tens of coal, and out of the seam called the Top or Yard Coal, and the Beaumont (included in the said class called the Upper Seams), or any seam or seams of the said colliery and coal mines, other than the said Low Main or Hutton Seam, 200 tens of coal per annum, and in the same indenture was contained a reservation for overworkings of a rent of 1*l.* 5*s.* per ten of any quantity in excess of the said quantity of 1200 tens per annum of coal worked and gotten out of the said seam called the Low Main or Hutton Seam, and of 15*s.* per ten of any quantity in excess of the said 200 tens per annum of coal worked and gotten out of the said seam called the Top or Yard Coal, and the Beaumont, or out of any seam or seams of the

said colliery and coal mines, otherwise than the said Low Main or Hutton Seam.

Some time after the granting of the lease of the 13th May, 1849, and while the defendant was in the plaintiff's service, he requested the plaintiff to admit him into copartnership with the plaintiff in the drift called the Upper Seams, for the plaintiff's interest therein, and proposed that a formal deed of partnership should be prepared. The plaintiff immediately refused the application, stating that he never contemplated entering into any such agreement, but only intended to give the defendant an interest in the proceeds of the sale of ironstone, fireclay, and coals from the Upper Seams, and objected to admitting the defendant into a copartnership in the Upper Seams for any part of the plaintiff's interest under the leases, as he the plaintiff had taken the colliery and the coal mines on lease at his own sole risk, and exclusively found all the capital expended thereon for purchasing engines, railways, and working the said mines, except only the expense connected with opening, working, and getting the ironstone, fireclay, and coals out of the class called the Upper Seams. The bill alleged that the defendant acquiesced in his refusal.

The bill alleged that the colliery was chiefly valuable for the coal, but it was customary for the tenants, including the plaintiff, to work and get ironstone and fireclay, and the rents for which were, from time to time, determined by arrangement with the colliery agent of the lessee; and, accordingly, on the said agreement being entered into between the plaintiff and the defendant, an arrangement was made with Lord Ravensworth's agent respecting the rents, and shortly after the granting of the lease of the 13th May, 1849, a further arrangement was made by the defendant with the plaintiff's concurrence for such working the Upper Seams on the fol-

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lowing terms:—Ironstone 6*d.* a ton, fireclay 6*d.* a ton, coal 10*s.* per "ten;" such payment for coal to be made independently for rent, and in lieu of rent for coal reserved in the lease of the 13th May, 1849. It was further arranged that the rents payable under this arrangement should be paid separately from the rents under the lease of the 13th May, 1849. This arrangement was verbal, and no provision was made for apportionment of the ground-rent payable by the plaintiff under his leases, but the plaintiff still continued liable to pay the rent of 2000*l.* reserved by the lease of the 13th May, 1849. The plaintiff, some time after the arrangement, proposed that a tentale rent should be paid him for all coal won by the plaintiff and defendant out of the Upper Seams in addition to the way-leave rent, but nothing definite was arranged until 1854. The plaintiff and defendant continued to work the ironstone and fireclay until it became certain that neither fireclay nor ironstone could be profitably worked by means of the then drift. About the year 1854 the working of ironstone was wholly abandoned and the working of fireclay suspended, but subsequently renewed, and since 1854 the plaintiff and the defendant carried on their working chiefly for coal, and both of them considered the arrangement as to ironstone at an end. The expenses of such workings were borne by the plaintiff and defendant equally, including the way-leave rent payable to the plaintiff, the rents payable to Lord Ravensworth, and the expense of working a new winning to the Upper Seams, and which is now called the Allerdean Colliery.

On the 26th October, 1854, the plaintiff wrote to the defendant the following letter:—

"As this concern has ceased to work clay or ironstone, and is entirely a coalpit and now in a thriving condition, I think I am entitled to charge the concern a small

tentale rent worked under my lease, and which I could have done myself had I pleased, and the term running on as some compensation for the facilities afforded by the capital outlay of the old colliery. As this thing has now reached a profitable point, I think I am entitled to, as the coals fetch 15*s.*, I think 2*s.* 6*d.* a ten rent could be afforded, if they are at 12*s.* then 2*s.*, or if at 9*s.* selling price 1*s.* 6*d.* per ten, &c. &c."

In reply to such letter the defendant on the 29th October, 1854, wrote as follows:—

"Your proposal of a tentale rent for the drift I cannot of course object to. At the same time I might observe that, with a coal of a most inferior quality and worked under considerable difficulties, that very few people would have persevered and taken such trouble as it has cost me to rear this 'infant concern' to its present condition. However, I have no doubt we shall have very little difficulty in coming to an arrangement. The amount of capital, in the shape of available stock and cost of formation, I should say will not be less than 5000*l.*, so that it now assumes a shape of some importance, and under these circumstances I think it would be very desirable to have a deed of partnership or agreement drawn up, such deed to be concurrent with the lease of the colliery, so that, if at any future time you should determine to dispose of your colliery lease, the operations of the drift might not form any impediment in the way of your doing so. At all events, it would avoid the possibility of any future misunderstandings, which, in matters of business, it is always better, if possible, to provide against."

In reply to such letter the plaintiff on the 29th October, 1854, wrote as follows:—

"With regard to the drift, I never intended it to be

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worked under a partnership deed, for, situated as it is, such a deed might place me or my heirs in a very unpleasant predicament, and there are many very cogent reasons against such a method of proceeding. Was it a new place with which we had begun operations it would have been different. When you applied to me first it was to work fireclay, ironstone, and the coal above it, and it was stated that four or five keels per day would be the quantity. The coals were so low in price and the profits so small I forbore to ask any rent for myself, but the case is very different now, fourteen or fifteen keels at a good price can afford to pay rent. A small rent here will help to reduce my other rents, and as railroads and drainage were all ready for the drift it can well afford to pay it. If you had had these to do 10,000*l.* would not have won it."

The 20th paragraph of the bill was as follows:—

"The drift referred to in the extracts set forth in the last two preceding paragraphs of this bill is the said Allerdean Colliery. The plaintiff, in stating in his said letter of the 31st day of October, 1854, that he never intended such drift to be worked under a partnership deed, meant (as was the fact and as was well known to and understood by the defendant) that the plaintiff never intended that there should be any formal copartnership between the plaintiff and defendant so as to give the defendant any estate or interest in the said Allerdean Colliery, or in any of the seams comprised in the said said drift called the Upper Seams; and, on the contrary, the plaintiff charges that, although the defendant as aforesaid applied to the plaintiff requesting to be admitted into partnership with the plaintiff in the said Allerdean Colliery, and in the seams comprised in the said drift called the Upper Seams, yet the plaintiff always refused such

applications, and the defendant, after the date of the said letter of the 31st day of October, 1854, did not again make any such application to the plaintiff as aforesaid, but acquiesced in the plaintiff's said refusal. By the reference in the said letter of the 31st day of October, 1854, to the situation of the said lastly hereinbefore mentioned drift, the plaintiff intended, and the defendant understood the plaintiff to refer to, the position of and other particulars relating to the said Team Colliery, and the said two classes of seams stated in the paragraph numbered two of this bill, and particularly to refer to the circumstance that for the reasons stated in the same paragraph the said two classes of seams could not be worked independently with advantage, and consequently that if the plaintiff were to agree to give the defendant any estate or interest in the said class called the Upper Seams such agreement might seriously interfere with and interrupt the working and getting by the plaintiff or his representatives of the said class called the Lower Seams. At the time when the correspondence by the said letters of the 26th, 29th, and 31st days of October, 1854, took place, as well as at the time when the said agreement between the plaintiff and the defendant was made as aforesaid, the defendant was in the plaintiff's service as aforesaid, and in such service was managing the working and getting of the said class called the Lower Seams, and the plaintiff considered (as the fact was) that while the defendant continued so to be in the plaintiff's service, and consequently had the management under the plaintiff of the whole of the said Team Colliery, no such interference with or interruption of the working and getting of the said class called the Lower Seams as aforesaid would be occasioned by allowing the defendant to work and get in the said class called the Upper Seams and giving him a share of the profits thereof. If the defendant had not been in the plaintiff's service as aforesaid

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the plaintiff would never have made the said agreement with the defendant, or any agreement with him or with any one by which the said two classes would be worked under different management."

Shortly after this correspondence, and in order to determine what amount of tentale rent should be paid to the plaintiff in pursuance of the letters of the 26th and 29th October, 1854, the plaintiff and defendant referred to Mr. Forster, a colliery viewer, to fix *inter alia* the amount of tentale rent for coal gotten out of the Allerdean Colliery and the drift called the Upper Seams, who awarded 5*s.* per ten of all coal so gotten. The bill alleged that this reference included a question as to a way-leave, and that the defendant acted on such reference, but no payment had been made to the plaintiff in respect of such tentale rent. The bill further alleged that the plaintiff and defendant continued to work the Allerdean Colliery and the drift called the Upper Seams, and during the last several years gained a small profit, but during the last two years there had been a loss. The bill alleged that the defendant had furnished the plaintiff with a statement of account, which showed a balance against the company of 6237*l.* 11*s.* 6*d.*, for which the creditor was pressing for payment, and of which the plaintiff had paid 500*l.* on account. The bill further alleged, by amendment, that Lord Ravensworth, in consequence of an action threatened by the creditor, threatened to distrain for rent due in respect of the Allerdean Colliery. In such statement furnished by the defendant no account was taken of the tentale rent due to the plaintiff. The bill charged that under the circumstances aforesaid the affairs of the said workings were insolvent, and ought to be wound up. The bill alleged that the plaintiff, having become dissatisfied with the management

of the Team Colliery by the defendant, lately gave him notice to leave, but that thereupon for the first time he claimed to be a co-partner with the plaintiff in the whole of the Upper Seams. The plaintiff charged the contrary of this allegation was the fact, and that neither he nor any other person lawfully authorized by him ever signed any agreement in writing, or memorandum or note in writing of any agreement, and that there never was any agreement in writing, for a partnership in the said Upper Seams, and the plaintiff in this respect claimed the benefit of the Statute of Frauds. As evidence that no such partnership existed, the plaintiff referred to a letter dated the 12th January, 1858, in which he forbade the defendant to open out another of the Upper Seams, and with which order the defendant acquiesced. The bill further alleged that since the commencement of the suit the defendant had improperly opened a seam of the Lower Seams, called the Maudlin Seam, stating that he had opened it for ventilation, but had without the plaintiff's knowledge worked for coal.

On the 29th of July, 1858, the defendant's solicitors sent to the plaintiff's solicitors the following proposal:—

"Allerdean Colliery.—Proposal for a dissolution of the partnership.—Mr. Barkus to undertake the payment of all debts against, and be entitled to receive all accounts due to, the colliery, on Mr. Burdon assigning over to him his share and interest in the said colliery, and in the two seams of coal now in operation, namely, the High Main and Yard Coal Seams, together with the rights, liberties, and privileges comprised in the lease from Lord Ravensworth, so far as they extend to these two seams.

"The payment of the amount due to Mr. Burdon for way-leave rent over Team Colliery Railway up to the period of dissolution to be spread over a term of four

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years, and to bear interest at the rate of 5*l.* per centum per annum, and all future way-leave rents accruing after that period to be settled half-yearly on the 30th day of June and 31st day of December.

"Any further compensation that Mr. Burdon may be entitled to for the value and assignment of his interest in the colliery, or for his permission to work the coal (after deducting his proportion of the debts), to be settled by arbitration, and to be paid by a tentale rent on the quantity of coals drawn to bank, or otherwise as may be agreed upon."

The plaintiff's solicitors, on the 31st July, returned the following counter-proposal:—

"Allerdean Colliery.—Proposal by Mr. Burdon for a dissolution of the partnership.—Mr. Barkus's proposition, as submitted by Messrs. Chater, Arnott, and Chater, is declined.

"Mr. Burdon requires the colliery plant, engines, fixtures, materials, and other stock, live and dead, to be valued by competent parties to be agreed upon. The outstanding book debts to be ascertained and collected, or valued as agreed, the colliery accounts to be investigated, the debts and liabilities to be also ascertained, and in case the debts and liabilities should exceed the assets by a sum of not exceeding 2000*l.*, Mr. Burdon proposes to take the said assets at the valuation, he receiving all accounts due to the colliery, and indemnifying Mr. Barkus against the debts and liabilities so ascertained. In case the debts and liabilities exceed the value of the assets by any sum above the 2000*l.*, such excess to be borne by Mr. Burdon and Mr. Barkus equally, Mr. Burdon nevertheless indemnifying Mr. Barkus to the extent of the 2000*l.*, and taking the assets as aforesaid.

If the assets exceed the debts the surplus to be equally divided, Mr. Burdon paying Mr. Barkus his proportion.

"A dissolution on these terms to take effect from 31st July, 1858.

"Mr. Barkus to give an answer to this proposition within a week.—31st July, 1858."

The plaintiff having received no reply, on the 13th August, 1858, the plaintiff gave notice that he dissolved the partnership, and required the defendant to desist from working for coal. On the 13th August, 1858, the defendant's solicitors wrote declining the plaintiff's proposal.

The bill alleged that since the commencement of the suit the defendant was working the Allerdean Colliery in a manner injurious to the Team Colliery, and had caused inconvenience by taking the waggons of the North-Eastern Railway Company intended for the use of the Team Colliery, and applying them to the use of the Allerdean Colliery, and also worked coal from the seams of the Upper Seams, threatened and intended to open out new seams in the Upper Seams, and to contract further liabilities in the name of the plaintiff and himself as co-partners.

The plaintiff also filed a supplemental bill, alleging that since the filing of the original bill the defendant had been improperly working the Meadow Pit and the Upper Seams, and thereby let down great quantities of water from the surface into the Allerdean Colliery and thence into the Team Colliery; and prayed for compensation and damages in respect of such wrongful working.

The defendant by his answer stated that he distinctly understood that the agreement for partnership was to be extended, and it did in fact extend, to the working of the whole of the available coal, fireclay, and

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ironstone in the Upper Seams, during the then term of the plaintiff's holding and the future remaining term to be obtained by him; and in consequence and upon the faith thereof he was induced to expend, and did with the full knowledge and concurrence of the plaintiff expend, capital and labour in developing and opening the said seams on a scale and to an amount commensurate with and calculated upon and adapted to the said anticipated and agreed duration of the said partnership, the deponent fully calculating that there would be ample time during the continuance of the said partnership to redeem and realize the said expenditure. That the defendant never acquiesced in the plaintiff's refusal to enter into a formal deed of partnership in any of the particulars stated by the plaintiff, but always considered such partnership established from its commencement in 1849; and, on the faith of such agreement, advanced capital in equal portions, and carried on the said workings for many years, and that no dispute ever arose between deponent and the plaintiff until the plaintiff's claim to a tentale rent, but that the defendant always refused to pay the tentale rent. That the new winning way referred to in the plaintiff's bill was merely a construction and extension of the old drift winning. That after the coal under that part of the estate first worked by the drift had been considerably exhausted by the plaintiff and the deponent, and the profits during that period having been equally divided according to the partnership agreement, without reserving any fund for further extension at the Meadow Pit, it became at last necessary to open out and fit up that pit for coal work, the expense for which purpose necessarily involved the advance of farther capital; and as it was inconvenient for either the plaintiff or the defendant then to provide capital for that purpose, they determined to raise, and did raise, the capital on credit, given to them by the Northumberland

and Durham District Banking Company, and other means, which involved the Allerdean Colliery in debt to the amount of upwards of 6000*l.*, of which 2300*l.* was obtained from the said bank. The said bank stopped payment on the 15th November, 1857, before the pit was put into profitable operation for repayment of the said debt. That under such circumstances the stoppage of the colliery workings, as desired and asked for by the plaintiff, would have been ruinous to the defendant, inasmuch as, if he had abandoned or lost his share at that time, it would have deprived the defendant of the means of paying his share of the liabilities, while the plaintiff would have been thus put into possession of the pit in profitable condition, and have been enabled to continue its workings and reap the entire benefit and profit of the defendant's share, which he submitted the plaintiff had no right or power to do. The defendant further stated that the plaintiff's proposal for a tentale rent was meant as a compensation for facilities which he erroneously alleged and supposed had been afforded. That, when the partnership agreement was first entered into between himself and the plaintiff in 1845, it was distinctly understood and agreed that the arrangement for working the Upper Seams was to continue during the plaintiff's holding of the said colliery under his then lease and the renewal thereof; and that defendant was to have and did acquire to that extent an interest in the said Allerdean colliery; and in accordance with the said understanding and partnership agreement, the necessary capital was advanced from time to time by the plaintiff and the defendant, with a view, as the plaintiff well understood, to work and exhaust all the coal comprised in the said seams, and the same had been worked ever since. The defendant submitted that he would not have carried on the said concern at his own personal risk, which he had done for several years, if he were

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subject to be expelled from the concern at any time at the will of the plaintiff without being allowed or able to redeem or obtain any return of his capital.

Argument.

Mr. *Bacon* and Mr. *A. G. Marten* opened the case on behalf of the plaintiff, but they were stopped by the Court, and, the evidence on both sides having been read, the Court called upon the defendant's counsel.

Mr. *Malins* and Mr. *Hobhouse*, for the defendant.—It was not necessary that there should be any written instrument creating a partnership; if the partners entered into a business on the terms of dividing the profit and loss, that constituted a partnership as effectually as an agreement by indenture, and all the usual incidents of a partnership followed: *Featherstonhaugh* v. *Fenwick* (*a*), *Crawshay* v. *Collins* (*b*). This case might be likened to one where persons had been seized of land in fee as co-owners, and had farmed it in partnership. In that case, if one would not go on the other might. There was no extravagance in supposing they were partners in the working for the whole period of the lease, although there was great difficulty in supposing they were partners for ever. It was quite different where the property was such as might reasonably be held in partnership, when the duration of it was reasonable, and the position of the parties was such that the business could not be carried on unless it were by means of the property. If both parties were dead the law would infer such a partnership, much more when both were alive, one speaking clearly to a reasonable and probable scheme, the other unable to give any other reasonable explanation of the apparent state of things. The evidence showed that before the agreement of 1845

(*a*) 17 Ves. 298. (*b*) 15 Ves. 218.

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Mr. Burdon had capital and the lease, whilst Mr. Barkus had no capital, but skill and experience. Mr. Burdon not having skill enough to make the Upper Seams profitable, Mr. Barkus conceived the idea of working all the minerals together. What more likely than that this should be the subject of a partnership? The defendant's right to have the benefit of a parol agreement supported by his own evidence could not be disputed: *Forster* v. *Hale* (*a*), *Dale* v. *Hamilton* (*b*), *Lindley on Partnership*, 82. The result of the evidence clearly showed an original agreement to work ironstone and coal in partnership; and that there was no alteration of this original agreement. [*Crawshay* v. *Maule* (*c*), *Ex parte Owen* and *Gutch* (*d*), *Fereday* v. *Wightwick* (*e*), were cited.]

Mr. *Bacon* was heard in reply as to part of the inquiry to be directed.

Judgment.

THE VICE-CHANCELLOR:—

The question is, whether or not the defendant has acquired an interest in part of the coal demised to the plaintiff commensurate with the duration of the lease which is the property of the plaintiff. If a lease be acquired for the purposes of a partnership, no matter whether acquired in the name of one partner or of all, being acquired for the purposes of the partnership and dedicated to the purposes of the partnership, that lease is part of the partnership assets. But where the lease is not acquired for the purposes of the partnership, but was antecedently existing—the property of one who, on his engaging in the partnership, agrees that a part only of the property in the lease shall be used for the purposes of the partnership, and containing a demise of other and

(*a*) 5 Ves. 308-314.
(*b*) 5 Hare, 369-382.
(*c*) 1 Swans. 495.
(*d*) 4 De G. & S. 351.
(*e*) Tamml. 250.

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larger property which never was dedicated to any purposes of the partnership, such a lease is only affected by the rights of the partner so long as the partnership lasts, unless there be some express agreement to the contrary, or some extraordinary circumstances, such as expenditure of partnership capital on the part dedicated to partnership purposes. In the present case, the plaintiff Mr. Burdon, long before the partnership was formed, was the lessee of large seams of coal, which are distinguished as the Upper Seams and Lower Seams. The Upper Seams, long before the year 1845, appear not to have been considered the subject of profitable working by the plaintiff; but in that year a proposal was made by the defendant that he and the plaintiff should join in working the Upper Seams, which were only part of the demise. In the absence of some express stipulation, or of conduct on both sides which would bind both parties as completely and absolutely as a stipulation in writing, to say that a part of the demised property became for the whole term of the demise the property of a partnership formed merely for working a part of what was included in the lease, seems to me to have no warrant either on principle or authority. It is said, however, that the lease which was existing when the partnership was formed was renewed during the currency of the partnership. But the renewed lease included all the property in the original lease, and the partnership was constituted merely for working a small part. As to the ironstone and fireclay, the right to them was acquired by a separate contract with the lessor, and was acquired for the purposes of the partnership, and for no other purpose; and therefore, to the extent of the interest in the ironstone and fireclay, that was an interest which constituted part of the partnership assets. But as to the seams of coal, nothing was done to bind the interests of the plaintiff, or to give the defendant an interest in those seams of coal during the whole period

of the demise, or to do that which the defendant always struggled for, namely, to make the partnership co-extensive with the duration of the lease of the seams of coal. Therefore, upon that part of the case, the defendant has entirely failed, and the plaintiff is entitled to a declaration that the defendant is not entitled to any interest beyond the duration of the partnership in the seams of coal demised to the plaintiff.

Upon the other part of the case very considerable difficulty has arisen, from the state of the evidence and the peculiar nature of the partnership property, and of the dealings between the plaintiff and defendant. The defendant has distinctly sworn that, as to one part of the partnership workings, there were erected at what is called the Meadow Pit, at an expense of what he states to be 5000*l.*, works in the erection of which he would never have concurred, as to his share of the expenditure, unless with a view to a profitable use of the workings so created in the partnership business he was carrying on with the plaintiff. Now, as the plaintiff has made use of his undoubted right to dissolve this partnership when he pleases, and as the partnership will now be dissolved from the date of the decree, he, having obtained the benefit of a dissolution, must do what fairness and justice require towards the partner whom he has expelled. If it turns out upon inquiry that the expenditure upon the works in question was made under such circumstances as that the defendant, if he had known it, would not have concurred in it, a fair allowance must be made to the defendant in respect of that expenditure in taking the accounts under the decree.

There is another question which is equally important. Up to the date of the decree, which will be the date of the dissolution, there has been a continuing partnership for the purpose of working the mines of coal, ironstone, and fireclay, carried on by plant and stock which is

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the property of both. The defendant says that the plaintiff, now that the profits have become considerable by means of the defendant's exertions as manager of the property, seeks to exclude him from sharing in those profits. The plaintiff, on the other hand, says it is not to be assumed that he intends to carry on these works; that he wants to have a sale of the stock and plant, which shall produce no more than the mere actual value of these utensils as produced upon the sale of an abandoned concern; and he insists upon a right to have the plant and stock sold upon that footing. Considering what the defendant has stated upon oath on this subject, though it is by no means clear that the defendant is entitled to have this stock valued as stock of what is called a going concern, yet the duty of the Court seems to be to direct an inquiry, in prosecuting which both sides may bring in evidence, so as to enable the Court to judge how the plant and stock are to be valued.

It is very clear upon the evidence that in October, 1854, the plaintiff wrote a letter to the defendant, in which, referring to his ownership in the other works included in the lease—works which were made available for the purposes of the partnership—he said it would be a fair thing that something should be allowed to him in the shape of a tentale rent in respect of the use of that part of his property for the partnership purposes. The answer of the defendant to that proposal distinctly states that the plaintiff's proposal of a tentale rent was a reasonable one; and the plaintiff by his bill prays that, in taking the account, he may be allowed a tentale rent of 5*s.* per ten. Assuming that 5*s.* is a proper rate to be charged, the right course will be to direct a reference to chambers to ascertain the amount due on that footing. Upon the whole case there must be a decree for the dissolution of the partnership from the date of this decree; a direction to take the usual partnership accounts;

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and upon these difficult subjects of inquiry the decree will be as follows :—Declare that the partnership is dissolved as from this day; declare that the defendant is not entitled to any interest in the seams of coal comprised in the indenture of lease dated the 13th May, 1849; direct an account of the partnership transactions, and an account of the credit, property, &c., of the partnership. Inquire and certify, having regard to the terms of the partnership and the purposes for which the works called Meadow Pit were erected and are now used or capable of being used, and the circumstances under which the expenses were defrayed, whether any and what sum ought to be allowed to the defendant in respect of such expenses. An inquiry whether, having regard to the state of the stock and plant of the said partnership, and to the purposes for which it is capable of being used by the plaintiff, the same ought to be valued as the plant and stock of a going concern, or upon any and what other footing; and it is ordered that the same be valued accordingly. An inquiry, what will be a proper sum to be allowed to the plaintiff for a tentale rent from October, 1854, on the footing of the letters of the 26th October and the 29th October, 1854. Reserve further consideration; no costs on either side; liberty to apply.

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EGLIN *v.* SANDERSON.

To an administration suit the executors put in their answer alleging that the suit was vexatious and that nothing was due, and resisted the demand for an account, but an account being decreed they claimed, first 400*l.*, and subsequently 60*l.*, but the chief clerk having certified that 220*l.* was due from them the Court ordered them to pay the costs of the suit. *Mosley* v. *Ward*, 11 Ves. 581, considered.

THE bill was filed by William Henry Eglin, and prayed that the trusts of the will of Joseph Eglin, dated the 13th August, 1860, might be administered, whereby, after directing all his just debts, funeral and testamentary expenses, to be paid, he gave to his wife Elizabeth Eglin a legacy of 50*l.*, also certain household goods, and an annuity of 200*l.* for her life in case she should so long remain his widow. The testator left to the discretion of his executors to set aside such parts of his real and personal estate, or both, as they should think best for better securing the payment of the annuity; and subject to payment of debts and the legacy and annuity above mentioned, gave the residue of his personal estate and effects, and also all his real estates, unto Joseph Sanderson, John Sanderson, and William Dryden, their heirs, executors, administrators, and assigns, upon trust to sell and dispose of the same real and personal estates, or of such part or parts thereof as they should think proper, for the payment of his just debts, for the benefit of the trusts of that his will, and upon further trust to stand seised and possessed of the residue for the benefit of any children he might happen to leave, or which might be born in due time after his decease, and to pay and apply the income as his trustees should consider reasonable and proper for and towards the maintenance, education, and advancement of his said children; and, when the youngest of his children should attain twenty-one, upon trust to assign and convey the residue among all such children, their heirs, executors, administrators, and assigns, as tenants in common. The testator appointed the said

Joseph Sanderson, John Sanderson, and William Dryden executors of his said will.

The testator died at Hamburg in March, 1836, leaving his widow and three children, Joseph Eglin his eldest son, the plaintiff William Henry Eglin, and Josephine Eglin. The widow died on the 22nd January, 1852, intestate, leaving no personal representative. Joseph Eglin, the son, died on the 23rd November, 1852, never having been married, and intestate. Josephine Eglin, the daughter of the testator, was born about the 28th August, 1836, after the testator's death. She was adopted by a friend of her father, was never recognised as a daughter of the testator, and was now living in Australia.

The bill was filed against Joseph and John Sanderson, William Dryden, and Josephine Eglin, who was out of the jurisdiction. It alleged that the plaintiff since the death of his mother had made various applications to the trustees and executors. In answer to such application William Dryden said that Joseph Sanderson had the entire management of the estate of the testator, and Joseph Sanderson stated that the will was of no use, and moreover that he did not know such a will was in existence. In reply to subsequent applications, it was alleged that the trustees and executors now stated that the testator during his lifetime conferred upon them full powers of management over his property; but they absolutely refused to discover of what the property consisted, or the terms of such powers of management, or to render any account.

The bill charged that the testator was at his death entitled to real and personal estate of large value, that the defendants as executors and trustees had possessed themselves of the personal estate, and had entered into receipt of the rents and profits of the real estate.

The bill prayed for execution of the trusts, for adminis-

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tration, and for accounts, charging the trustees with profit of any business in which the testator's monies might have been employed, and with losses arising from default.

The defendants put in a joint and several answer, dated the 20th September, 1855, whereby they said that the testator's estate was much incumbered, and that he was involved in debt; that at the time of his death he was seised of no real estate, having immediately previously to the date of his will, viz. on the 11th and 12th August, 1830, conveyed all his real estate to the use of them, the defendants, their heirs and assigns, upon trusts for the payment of his creditors.

That the real estate comprised in the said indentures of the 11th and 12th August, 1830, consisted of certain particulars, all of which were subsequently sold by the testator, with the concurrence of his trustees, in the years 1832 and 1835 respectively. That in execution of the trusts so reposed in them they, the defendants, disposed of the principal part of the trust premises, and reconveyed the residue to the testator in his lifetime, subject to a mortgage thereon. That in the year 1835 the testator carefully investigated the accounts, and, at a meeting held at Hull on the 8th October, 1835, he finally balanced the said accounts, and signed a memorandum to the effect that the accounts then exhibited and marked (A.) were finally balanced, it being agreed that the stated balance of 154*l.* should be paid to Mr. Eglin, and that the ship *Diadem*, with the advantage of her then present voyage, should be transferred to Mr. Eglin subject to his granting a mortgage thereof for 900*l.*, to secure Worrill's Trust, and, on his giving to Mrs. Harker a sufficient security for the 250*l.* due to her. All the rest of the property was to be assigned to Messrs. Sanderson subject to the other debts. That the private debts of Mr. Eglin since the creation of the trust were to be paid by him.

That on the arrival of the *Diadem* she was to be assigned to Messrs. Sanderson, for the purpose of enabling them to receive the freight, out of which they were to repay themselves the 261*l.* 10*s.* outfit, and 55*l.* 5*s.* 10*d.* insurance, or any subsequent claims on the vessel; in case of any deficiency, Mr. Eglin engaging to make good the difference. The account (A.) was then set out, stating the balance of 154*l.* due to Mr. Eglin. They stated that the vessel was then at sea, and no legal mortgage of the vessel was ever executed. The defendants further said that had such mortgage been executed there would not have been any occasion to have proved the testator's will, which was wholly inapplicable to his altered circumstances. That on the 27th February, 1836, the testator executed a release to the defendants, reciting that the greater part of the trust premises had been sold, and the residue thereof, subject to a mortgage thereon, had been conveyed and assured to the said Joseph Eglin, his appointees, heirs, and assigns, as he thereby admitted. That at the same time a memorandum was signed, bearing the same date, stating that the undersigned Joseph Eglin acknowledged that, notwithstanding the release, there yet remained to be effected a mortgage bill of sale on the *Diadem;* also a transfer of the *Lowndes* to Messrs. J. and J. Sanderson, and a discharge from the debt of Mrs. Harker and the executors of the late Mr. Sanderson.

The defendant Joseph Sanderson said he "gave to the plaintiff, to the best of his power, an account of the way the testator got through his property by extravagant expenditure, and he informed the plaintiff, as the fact was, that his father died in hopeless insolvency." He further said that the plaintiff afterwards wrote to him, the defendant, requesting the loan of 20*l.*, which was refused. The defendants positively denied that there remained a large or any balance of the personal estate

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received by them, or any of them. The defendant Sanderson said that they applied the proceeds arising from the sale of the ship *Diadem*, so far as the same would extend, in payment of the debts of the testator. This sale was made in the month of April, 1838, for the sum of 1000*l.*, and both the defendants Sanderson alleged that after such sale, upon payment of the expenses of the testator's will, of the principal sum of 900*l.* and interest to Worrill's executors, and of 250*l.* and interest to Mrs. Harker, there remained a balance of 400*l.* and interest still due to them. The defendant Dryden said, that on the 27th February, 1836, the testator borrowed 50*l.* of him, on his memorandum, which was still unpaid; that after the testator's death he paid the sum of 43*l.* 1*s.* 11*d.* out of his own monies for a schoolmaster's bill for the education of the plaintiff and his brother, and he afterwards caused the plaintiff and his brother to be removed from Hamburg and placed under the protection of their grand-aunt, Mrs. Harker. The last paragraph of the answer of the defendants Sanderson was as follows:—

"We say that the prosecution of this suit can lead to no useful result, as there is no estate of the testator's remaining unapplied; but, as the executors under the said will, we, these defendants, are ready and willing to account for the said estate as this honourable Court shall be pleased to direct, on being paid and indemnified our reasonable costs on this behalf."

On the 5th May, 1860, the cause came on for hearing, when the usual administration decree was made and certain inquiries directed. On the 2nd July, 1861, the chief clerk, by his certificate, found that the defendants Joseph and John Sanderson, the executors, had received personal estate not specifically bequeathed to the amount of 1382*l.* 1*s.* 1*d.*, and they had paid or were entitled to

be allowed on account thereof sums to the amount of 1179*l.* 5*s.* 9*d.*, leaving a balance due from them of 202*l.* 15*s.* 4*d.* on that account; also that the only debt of the testator which had been allowed was one of 52*l.* 4*s.* 2*d.* due to the defendant William Dryden. The legacy of 50*l.* to the widow had not been paid, and was due to her representatives. The annuity of 200*l.* also was never paid.

Statement.

The case now came on for further consideration, and on a motion by the plaintiff to vary the chief clerk's certificate.

Argument.

Mr. *Malins* and Mr. *T. H. Terrell*, for the plaintiff, contended that the executors had been guilty of gross impropriety. They had sworn that nothing was due from them, but that on the contrary they were creditors of the estate to a considerable amount. The result, however, proved that a considerable balance was due from them.

On the motion to vary the chief clerk's certificate they contended that, the chief clerk had improperly allowed to the defendants several items, which, if disallowed, would increase the balance due from them.

It was submitted that in any view of the case the defendants Sanderson must be charged with interest on the balance found due from them, and must pay the costs of the suit.

Mr. *Bacon* and Mr. *Renshaw* appeared for the defendants Sanderson.

Mr. *Shee* appeared for the defendant Dryden.

Judgment.

THE VICE-CHANCELLOR:—

There is no doubt as to the balance due, and no doubt of the plaintiff's right to charge the executors, the Sandersons, with interest at 4*l.* per cent. on that balance

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from April, 1838. There must, therefore, be a direction to pay that balance, with interest at 4*l.* per cent. from April, 1838, the amount to be verified by affidavit.

The material question is as to the costs of the suit. It is the duty of executors to keep proper accounts, and to have those accounts ready for inspection and examination. Before this bill was filed, repeated applications were made by the plaintiff for information as to the state of the assets. No account was rendered to him, and he was ultimately told that, unless he came with a professional adviser, they would not give him any further information, as he was under some delusion with regard to the testator's estate. The plaintiff, under these circumstances, filed his bill. By their answer they positively swear that nothing is due, that the suit is vexatious, and that no good result could follow from taking the accounts. The Court, however, decreed the accounts to be taken; and upon the result, the first thing done is, that the Sandersons carry in an account, claiming a balance of 400*l.*, no doubt very improperly claimed, as due to them. Then, when that account was directed to be reviewed, they brought in an account confined to their dealings with the assets after the testator's death, and upon that account they claimed a balance due to them of 60*l.*, upon which they charged interest. The chief clerk finds that a balance of 202*l.* is due from these executors. The circumstance that interest is clearly chargeable against executors in respect of a balance in their hands, was held by Lord Eldon as a reason *per se* for charging the executors with costs. In the case of *Mosley* v. *Ward* (*a*), Lord Eldon said "Where such general dereliction of duty obliges the Court to treat interest or balances in the hands of an executor as a specific demand, the same principle calls upon the Court

(*a*) 11 Ves. 582-3.

to compel him to make it good to the infants in point of costs." That rule so stated by Lord Eldon has not been rigidly acted upon in subsequent cases. On the question of costs, even when interest is chargeable, the Court looks at the general conduct of the executors in their management of the assets of the testator. In this case their general conduct has been unsatisfactory: their conduct before the litigation is unsatisfactory; their conduct subsequent to the litigation is in the highest degree unsatisfactory, for they attempted to intimidate the plaintiff by their answer, and to prevent his asking for any decree, by saying that something was due to them. The defendants must, therefore, pay the costs of the suit as to the accounts of the personal estate.

The bill, however, charges that the testator had real estate, the rents and profits of which were dealt with by the defendants. This is a separate charge, deliberately made and not proved. Founded upon that charge there was an inquiry directed by the decree as to what real estate the testator had. Nothing appears to justify the plaintiff in adhering to that charge, or in asking for that inquiry; and I think I can only allow to the plaintiff, as against the defendants Sanderson, the costs of the suit except so much of it as relates to the real estate. I have had some doubts whether the costs of that part of the suit which relates to the real estate should fall upon the plaintiff, but upon the whole I think the demand has been made without sufficient ground to justify it, and has occasioned some expense. Therefore the defendants Sanderson (not Dryden) must pay the taxed costs of the suit, except so much as relates to the real estate; and the costs of so much of the suit as has been occasioned by the relief sought in respect of real estate must be taxed and paid by the plaintiff, and the amount deducted and set off against the costs which are payable from the defendants Sanderson.

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Jan. 15th.

TURNER *v.* MAJOR.

Where two partners, each carrying on the partnership in separate districts, agreed to dissolve, and that the partnership premises, stock, and goodwill should be sold, and until sold should vest in receivers, the Court restrained one partner, who had made use of the partnership property, from carrying on the business on his own account in one district, and directed him to account for the profits.

IN November, 1854, the plaintiff and the defendant became partners in the business of manufacturing chemists, tar distillers, and dealers, which they henceforth carried on as co-partners at Boughton, in the city of Chester, where the defendant had previously carried on the business of a printing ink manufacturer, the plaintiff having previously carried on the business of a manufacturing chemist, tar distiller, &c., at Wolverhampton on his own account. Draft articles of partnership were proposed, in which the term was intended to be filled in for the period of seven years, but was in fact left blank, but the articles were in all other respects agreed on and engrossed, but never executed. The sum of 3000*l.* was advanced by the partners in equal proportions, but out of it 400*l.* was allowed to the defendant for stock in trade, &c. &c., used by him at Boughton.

The bill alleged that the business at Chester was always carried on on premises there which, until the negotiation for a dissolution of the partnership, in 1861, the defendant represented belonged to him in fee simple, and for which the partnership paid a rent of 30*l.* a year up to 1855, when an additional portion of land was hired, and for which the partnership paid the defendant the increased rent of 8*l.* The plaintiff alleged that, in addition to the stock in trade, machinery, and fixtures which were purchased and paid for by the partnership, very valuable fixtures and other improvements had from time to time been set up for partnership purposes by means of partnership monies, on the premises at Boughton, on the understanding between the plaintiff and the defendant that upon the termination of the partnership all

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those fixtures should be removeable, and be deemed partnership assets, and the value of the other improvements be paid for, or allowed in account by the defendant. In 1857 the plaintiff and defendant as such partners opened another establishment at Awsworth, in the county of Nottingham, and had ever since carried on the business, which was of a lucrative character, at these three places. The plaintiff superintended the erection of the works at Wolverhampton, and for about twelve months superintended the business there, but as soon as it was thoroughly established there he fixed his residence at Chester, and by an arrangement between the partners he took charge of the business in Chester, and the defendant superintended the business at Awsworth and Wolverhampton, at which last place he resided.

In the summer of 1861 negotiations were opened between the partners for the dissolution of the partnership, when it was ultimately agreed that the partnership should be dissolved by mutual consent on the 31st October, 1861, but that the business, unless sold on or before that day, should be kept up and maintained after that day for the benefit of the partners until a sale thereof as a going concern could be effected.

The plaintiff's solicitor accordingly prepared a memorandum, which he sent to Mr. Kitson, the defendant's solicitor; subsequently the two solicitors met, when it was signed by the defendant's solicitor as follows: "Subject to alterations in red ink, I approve of this memorandum. Hy. Kitson, solicitor for Mr. Major."

The memorandum was as follows:—

"Messrs. Major and Turner's Partnership.

"1. That the accounts of the partnership be forthwith made up and a balance arrived at to the 31st day of October and when so made up that the same be finally audited and signed by both partners.

"2. That the books of accounts and all other books at

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the several works belonging to the said partnership be open during office hours to the inspection of either partner from the date hereof, at the offices of the firm at the respective works to which they belong.

"3. That an inventory be forthwith taken of all the machinery, plant, flats, vessels, and stock in trade at the several works of the said partnership, and a copy thereof forwarded to either partner requiring the same.

"4. That a particular account be taken of all the several contracts entered into between the said parties, or either of them, giving the names and addresses, dates, and all other necessary detail.

"6. That the freehold portion of the partnership works situate at Wolverhampton, with the leasehold portion of the partnership works situate at Nottingham, together with the machinery, plant, working apparatus, stock in trade, goodwill, and existing contracts at the said works be offered for sale by public auction in two or three lots, subject to such conditions of sale as shall be settled and agreed upon by the solicitors of the respective partners, and that each partner join in all proper conveyances for the completion of the title to the said several works, goodwill, contracts, and premises.

"7. That Mr. R D Doughty, of Wolverhampton, and Mr. William Henry Johnston, of Chester, be receivers of the partnership estate, and act in the winding up of the same under the direction of the respective partners at the several places heretofore under their respective control, and to whom the whole partnership estate shall be conveyed on the 31st October instant, and assured with usual declaration of trust as to the money received to pay partnership debts and accounts and divide surplus between the partners, such deed to also contain all other usual conditions in cases of dissolution. Notice of dissolution to be signed on the 31st of October, and published in *Gazette*, in the Wolver-

hampton and in Chester papers immediately afterwards. Dated the 21st October, 1861."

A notice of the dissolution of the partnership was subsequently published in the newspapers.

The bill alleged as follows:—

"10. The goodwill of the partnership business is an asset of very considerable value, and it was accordingly part of the agreement between the plaintiff and defendant for the dissolution of their partnership, that the goodwill should be sold for their joint benefit, and that in the meantime until such sale should be effected the partnership business should be kept together as a going concern, and nothing be done by either partner prejudicial to the value of that goodwill, and that neither of them should trade, or attempt to trade, on their own account. And accordingly the plaintiff, upon his return to Chester from the said meeting at Wolverhampton, and in accordance with an agreement to that effect, which had been come to between the plaintiff and defendant at that meeting, prepared and sent to most of the customers who usually dealt with the Chester branch of the partnership the following circular:—

"Boughton Chemical Works,
"Chester, 31st October, 1861."

"Dear Sir,

"We beg to inform you that on this day our partnership terminates, but the business will be carried on at our respective works, situate at Chester, Wolverhampton, and Awsworth near Nottingham, until arrangements have been completed for the proper transfer of possession to one or other of us, or indeed new proprietors, should the works pass from both of us by public sale. In the meantime the several works have been placed in the hands of receivers, who will under our joint superintendence attend

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to the business as heretofore, until a final close of the partnership business, when you shall be duly informed.

"Yours truly,

"MAJOR & TURNER."

The plaintiff's solicitor also, on the 5th November, by the plaintiff's direction, sent to Mr. Kitson, the defendant's solicitor, a copy of the above circular, in order that as agreed at the meeting a similar notice should be sent to the Wolverhampton and Awsworth branches of the partnership business. After the meeting at Wolverhampton the plaintiff's solicitor prepared a draft conveyance, and assignment of all the partnership estate and effects, including the goodwill, to Messrs. Doughty and Johnston on trust for sale, and sent the draft to Mr. Kitson on behalf of the defendant, but he returned it, refusing to approve of it, but with these words on the endorsement:—"If goodwill were assigned or sold, neither partner could afterwards commence business."

The bill alleged that in the end of November, 1861, the plaintiff for the first time received information that the defendant never sent to the customers of the Wolverhampton and Awsworth branches any circular in pursuance of the agreement, but on the contrary, since the 31st October, 1861, impeded Mr. Doughty in the discharge of his duties as receiver and manager, and intercepted and retained letters addressed to the firm on partnership business, and executed on his own private account at Wolverhampton on the partnership premises orders contained in those letters and principally by aid of the partnership monies and effects has carried on on his private account the business of a manufacturing chemist and tar distiller, and had been endeavouring, and in numerous instances with success, to induce the persons who had theretofore been in the habit of dealing with the plaintiff and defendant as such partners

to withdraw their custom from the partnership and transfer the same to him on his own private account. The bill alleged that the defendant by his conduct, which he intended to continue, had already greatly diminished the goodwill of the business at Wolverhampton, and if he were suffered to continue the said business would shortly become wholly unsaleable. That, notwithstanding the provisions of the memorandum of the 21st October, he had not made, or suffered to be made, the account and inventory of the Wolverhampton and Awsworth business, though frequently required to do so.

The bill alleged that since the 31st October, 1861, the plaintiff had devoted himself wholly, in conjunction with Mr. Johnston, to carrying on partnership business at Chester, and had maintained it in its integrity as a going concern. The bill alleged that previously to the dissolution, and during the existence of the partnership, the defendant had made alone divers valuable contracts, the benefit of which he claimed to retain on his own account. The bill also alleged that the defendant was not the owner in fee of the premises at Chester, as he had represented himself to be, but that his mother was the freeholder, and at the instigation of the defendant she claimed the fixtures.

The bill prayed that it might be declared that the partnership was dissolved on the 31st October, 1861, on the terms that the business thereof should be kept together, and carried on until a sale of the same and of the goodwill thereof as a going concern could be effected; that until the sale the defendant might be restrained from carrying on on his own private account at Wolverhampton and Awsworth the said business, or from doing any act whereby the value of the said goodwill of the partnership business might be prejudiced.

That it might be declared that the plaintiff was entitled to participate in the benefit of contracts entered

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into by the defendant in the way of the partnership, since the commencement of the partnership, and either before or after the dissolution. That the partnership business and goodwill might be sold and the affairs wound up; that an account might be taken of all the partnership dealings and transactions, including those carried on ostensibly by the defendant on his own account, &c., &c. That Doughty and Johnston might be appointed receivers.

In the long vacation Vice-Chancellor Wood, as vacation judge, granted an injunction in the terms of the prayer of the bill.

Argument.

Mr. *Malins* and Mr. *Phear* now moved for an injunction that until the sale the defendant might be restrained from carrying on at Wolverhampton and Awsworth, or either of them, the said business; or from doing any other act whereby the value of the goodwill of the partnership might be prejudiced.

Mr. *Bacon* and Mr. *Serjeant* for the defendant.—There was nothing in this agreement to restrain either partner from carrying on the same trade in the same neighbourhood; the most that the agreement amounted to was that the goodwill should be sold for the benefit of the partners, but, if so, either partner might set up the same trade, *Shackle* v. *Baker* (*a*). "The sale of a goodwill does not prevent the vendors setting up again a similar trade, without express covenant, or fraud by representing it as a continuance of the old trade, or by conduct encouraging others to involve themselves in the confidence that he would not trade again," *Cruttwell* v. *Lye* (*b*). In *Churton* v. *Douglas* (*c*) also the same doctrine was laid down. In *Kennedy* v. *Lee* (*d*) Lord

(*a*) 14 Ves. 468.
(*b*) 17 Ves. 335.
(*c*) 1 Johnson, 174.
(*d*) 3 Mer. 441.

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Eldon held that goodwill was merely confined to the partnership premises; in this case it was not pretended that there was anything in the agreement to restrict the legal rights of either of the partners to carry on the business in his own name, and therefore to accede to the plaintiff's demand would be in effect to add a new term to the agreement. It was submitted therefore that the motion must be refused.

Mr. *Malins* was heard in reply.

THE VICE-CHANCELLOR:— *Judgment.*

The difficulty is in the construction of the agreement by which the leasehold and freehold portions of the partnership works, together with the machinery, plant, stock-in-trade, and goodwill are to be sold for the benefit of the partners, and in the meanwhile are to be vested in the receivers, who are to be subject to the control of both the partners. The agreement is clear enough that the goodwill is to be sold as part of the partnership assets and for the benefit of the partners. The evidence shews that both at Wolverhampton and Awsworth, during the possession of the receiver, the defendant made use of the partnership premises and the stock and effects belonging to the partners for his own exclusive benefit. He had no right to do so, and he has been carrying on a business in which the plaintiff is entitled to share. The defendant has contended that the agreement did not contemplate that the goodwill should be sold. But that is not so, for he has signed the agreement, which distinctly provides for the goodwill being sold as a part of the partnership *assets*.

It has been contended that the effect of the injunction will be to prevent the defendant from engaging in business at all on his own account; but that is

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a mistake. It will restrain the defendant until the sale from doing any act to prejudice the partnership property.

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Jan. 28, 29.

BLEST *v.* BROWN.

A surety who executes a bond on a misrepresentation by the obligee of a material fact is entitled to relief in this Court; therefore, where the plaintiff was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, the Court directed the bond to be cancelled.

Where the bond by a surety purported to guarantee the payment of flour to be supplied by the obligee (of a specified quality) in order to enable the principal debtor to execute a contract, and the obligee designedly supplied inferior flour so that the contract was annulled, the obligor is entitled to have the bond cancelled.

THIS bill was filed in January, 1861, and afterwards amended, by A. M. Blest, of Francis Street, Woolwich, vintner and licensed victualler, against William Brown and William Moore, millers, carrying on business at the Globe Flour Mills, Lower Shadwell, and Charles Henderson Millar, baker and contractor, of Woolwich.

On the 1st May, 1860, the Government issued notices of tender for a contract to supply the barracks at Woolwich and Deptford with bread, for six months from the 1st June, 1860, when several tenders were made, and the tender of the defendant Millar was accepted on the 16th of May. The conditions of the contract as to the mode of paying the contractor were as follows:—

Art. 9.—That, when the contractor's account for his deliveries should have been duly passed at the War Office, he should be paid by an order, to be transmitted to him, authorizing him to draw a bill at seven days' sight, on the Paymaster-General.

Art. 10.—The Deputy-Commissary-General was to

have full power and authority to terminate the contract by giving one month's notice to the contractor.

Art. 12.—That the bread should be made from good wheat flour, in the proportion of one-third of white to two-thirds of red wheat, to be dressed through wire No. 60, without any adulteration whatever. The bread was to be of the quality denominated "best seconds," in the baking of which yeast and not leaven was to be used.

The defendants Brown and Moore had for two years previously supplied the defendant Millar with flour; and previously to tendering for the above contract, Millar consulted Frederick Brown, the agent of Brown and Moore, and brother of the former, as to the terms upon which they would supply him with flour, to enable him to tender for the contract.

On the 7th May, Brown and Moore wrote to Millar in the following terms:—"Dear Sir,—We agree to supply you with 100 sacks per week of our No. 2 flour, at the net price of 39*s.* 6*d.* per sack, delivered at your bakery, Artillery Place, Woolwich, in our sacks, you paying the pitching money of 1*d.* per sack, and returning the empty sacks to our carman, free from any charge as sack-money, for a period of six months, commencing the 1st June, next, in the event of your obtaining and fulfilling the contract to supply bread to the barracks at Woolwich and Deptford for that period."

After Millar had obtained the contract various negotiations took place, as to which there was a conflict of evidence.

The plaintiff's case appeared to be this:—He alleged that Millar on several occasions in May, 1860, requested him to become security for him (Millar) to the amount of 500*l.* to enable him to carry out the contract, and the plaintiff at first refused, but on the 29th of May, Millar came to plaintiff's place of business at Woolwich with

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Frederick Brown. They requested plaintiff to become security in respect of the contract, and Frederick Brown represented to him that he (plaintiff) was only asked to undertake that Millar should duly hand over the Government bills as they were received by him from the Government to Brown and Moore, so as to pay Brown and Moore for the flour which they were to supply to Millar. The plaintiff thereupon asked Frederick Brown whether Millar owed anything (meaning any trade debts) to the firm of Brown and Moore, and Frederick Brown told the plaintiff "No," and said that Millar owed them nothing, or to that effect. That in reply to the plaintiff's further inquiries, Frederick Brown said he had gone through the calculations, and had no doubt the contract would clear 15*l.* a-week of net profit to Millar, or to that effect. Frederick Brown then produced a bond (the subject of the present suit), already prepared and ready for execution, which the plaintiff then executed on the faith of the above representations, without having considered or read over the same, or heard it read over. No previous communication respecting this instrument was made to the plaintiff or his legal adviser.

The defendant Millar deposed that, previous to his obtaining the contract, he had several conversations with Frederick Brown on the subject, he told Frederick Brown that he thought with Brown and Moore's quality of flour, No. 2, and with the assistance of mixing rice therewith, he could make bread that would pass the Government inspection, or used words to that effect; that Frederick Brown agreed to send him (Millar) a sample of their No. 2 flour, to try experiments in mixing; that, accordingly, two sacks of No. 2 flour were sent by Brown and Moore, on the 26th of April, 1860, out of which he (Millar) made some bread with a mixture of boiled rice, which Frederick Brown examined, and agreed that it would fully satisfy the Government inspection. That on the

same day Millar said he was induced to believe, from a conversation with Frederick Brown, that he could obtain rice indirectly with the assistance of Brown and Moore. The whole of these statements were positively denied by Frederick Brown, except as to the two sacks of flour sent on the 26th of April, which he said were sent to Millar, and were what he was in the habit of using in his general shop trade. In cross-examination Frederick Brown said that it was on the 30th April that he first heard from Millar himself of the Government tender, and that he (Millar) intended to compete for the contract.

The bond was dated the 29th May, 1860, in the penal sum of 500*l.*, from the defendant Millar and the plaintiff to the defendants Brown and Moore. The conditions were as follows:—

"Whereas the said Charles Henderson Millar has entered into a contract with her Majesty's Government for the supply of a certain quantity of bread at the barracks of Woolwich and Deptford for six months from the 1st of June, next, and has applied to the said William Brown and William Moore *to supply him with flour to enable him to carry out such contract,* which the said William Brown and William Moore have agreed to do upon the said Charles Henderson Millar and the said Alexander Melville Blest entering into the above bond *for the due payment to them of the price agreed upon for such flour.* And whereas, the said Charles Henderson Millar has agreed to draw and hand over to the said William Brown and William Moore the bills upon the Paymaster-General, which the said Charles Henderson Millar may become authorized to draw under the said contract. Now the condition of the above written bond or obligation is such, that if the said Charles Henderson Millar, his heirs, executors, or administrators, shall duly

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deliver to the said William Brown and William Moore, their executors, administrators, or assigns, the said bills of exchange, as and when drawn, and if the said Charles Henderson Millar and Alexander Melville Blest, their or either of their respective heirs, executors, or administrators, shall within fourteen days after the expiration of such six months pay or cause to be paid unto the said William Brown and William Moore all monies that may be due to them from the said Charles Henderson Millar, his heirs, executors, or administrators, *for the flour so supplied as aforesaid,* then this obligation to be void, otherwise to remain in full force, virtue, and effect."

The bill alleged that there was at the time of the execution of the bond a trade debt of 71*l.* or upwards due from Millar to Browne and Moore, which debt was expressly denied and concealed by Frederick Brown. Secondly, that Brown and Moore had received some of the Government bills, and had applied the proceeds to pay debts due by Millar to them for goods not properly connected with the contract, and for flour sent with the view and intention of enabling Millar to evade the contract.

On the 13th July the defendant Millar was informed by the Deputy-Commissary-General that, in consequence of the repeated complaints of the inferior quality of the bread, and the numerous rejections which had taken place without any amendment, he thereby had notice that his contract would be cancelled in one month from that date.

On the 18th July, 1860, the defendant Brown wrote to the plaintiff the following letter:—

"Dear Sir,—

"We think it right to inform you that Mr. Millar received on Saturday an order from the Accountant-General to draw upon the Paymaster-General for between

700*l.* and 800*l.*, notwithstanding he has repeatedly informed us that he had not received it. We are sorry to say that Mr. Millar appears to be keeping out of the way, and we cannot get to see him. Under these, what we consider, grave circumstances, we think it is only due to you to be apprised of it. Perhaps you will see Mr. Millar without delay, as the consequences of a further persistance in the course he is adopting may be most serious."

The plaintiff alleged that, at the date of this letter, the amount due from the Government to Millar was received by Brown and Moore, though not justly due to them, to the great injury of the plaintiff and of Millar, who thus became unable to perform his contract.

The plaintiff further alleged that he had lately discovered, as the facts were, that the defendant, Millar, previous to tendering for the contract, went over and discussed the terms of the proposed contract not only with Frederick Brown as the agent of the defendants Brown and Moore, but with and in the presence of them or one of them; and discussed the method by which the terms of the contract as to the quality of the flour to be supplied to Millar by Brown and Moore might be evaded, and flour might be used of quality inferior to that mentioned in the contract, and that Brown and Moore designedly, and for the purpose of enabling Millar to evade the terms of the contract, agreed by letter to send and did send flour of a wholly different and inferior quality, and intended to be mixed with rice, contrary to the contract; and afterwards sent Millar flour not only of such different and inferior quality, but also inferior to the sample quality which they had sent, in order to enable Millar to try experiments with a view to such evasion.

Mrs. Blest in her affidavits and on cross-examination corroborated the plaintiff's account of the interview at the

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plaintiff's house on the 29th May, 1860. The bill charged that the bond was void in equity as against the plaintiff, not only by reason of the misrepresentations made to the plaintiff, but by reason of the conduct of the defendants; and prayed, for an injunction to stay the defendants Brown and Moore from taking proceedings at law on the bond; that the bond might be delivered up for the purpose of being cancelled, that the plaintiff's execution of the same might be cancelled, and that the plaintiff might be declared entitled to be indemnified out of the collateral securities taken by the defendants Brown and Moore from the defendant Millar for the loss and injury he had sustained.

The defendants Brown and Moore, by their answer, said that after Millar had obtained the contract, on his applying to them to supply the flour, they stipulated that if they supplied him, he should hand over to them, immediately when drawn, the Government bills payable in respect of the contract, and give them security for the amount to become due to them, and he agreed to give them security by way of second mortgage by deposit of a lease of some houses in Catherine Square, by the deposit of the lease of his house, and moreover by a security on some property which he represented his wife to be entitled to. Afterwards, instead of the security on his wife's property, the defendant Brown agreed to accept the plaintiff as security for 500*l.* They then stated their belief as to what occurred at the interview of the 29th May in terms similar to those deposed to by Frederick Brown below.

They said that in the month of July, 1860, the plaintiff, although, according to his own showing, he understood that he was undertaking that the Government bills should be duly handed over to them, obtained possession of one of the Government bills, bearing date 16th July, 1860, for 771*l.* 5*s.* 7*d.*, indorsed by Millar, and that he left it for

acceptance at the Paymaster- General's office. That the plaintiff refused to deliver it up to them, Brown and Moore, or to give them authority to receive it from the Paymaster-General; and on the 26th July, 1860, Brown and Moore obtained an injunction to restrain Millar and the plaintiff from negotiating the said bill, or interfering with their receiving the same; and the plaintiff afterwards consented to deliver up the bill to Brown and Moore, and to pay their costs of suit. They admitted that there was a debt of 71*l.* 10*s.* 6*d.* due to them for flour supplied to Millar for the retail trade of his shop. They denied, to the best of their information and belief, that such debt was concealed from the plaintiff. They said they received no part of the sum due to Millar from the Government other than the 771*l.* 5*s.* 7*d.* above mentioned; and they said they believed that Millar ceased to carry on his business in consequence of Government cancelling his contract, owing to his supplying bad bread. They admitted the right of the plaintiff to a transfer of all their securities on payment to them of the full amount due to them from the defendant Millar upon such securities, but they submitted and insisted that the bond was not in equity wholly void as against the plaintiff, but valid and binding on him, and that the same, if not void *ab initio*, did not become void by their conduct. They admitted having brought an action on the bond. They submitted that the same had become forfeited at law by the neglect of the defendant Millar and of the plaintiff to pay them the monies due to them for flour supplied, as in the condition to the bond mentioned, and that the plaintiff was liable for the sum of 500*l.* and interest. They submitted that the bill was a mere attempt to delay their action, and ought to be dismissed with costs.

The defendant Millar by his answer deposed that, after his tender had been accepted, he was surprised to hear from Frederick Brown that Brown and Moore would

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require a guarantee for payment. On the 30th May, 1860, he (Millar) signed a memorandum to deposit with Brown and Moore the lease of his business premises. Afterwards William Brown said that with this security and a bond for 500*l.* he should be satisfied. A meeting took place at the Corn Exchange, and William Brown then read over the conditions of the Government contract. That when he came to the twelfth condition he (Brown) observed, "Well, this is not what we are going to supply you with—we are not going to supply you with white," and I replied, "Well, if you supply No. 2 equal to the two sample sacks which I lately received, it would answer my purpose with a mixture of rice;" and W. Brown then said, "Oh! we must have nothing of that sort," or words to that effect. That on the occasion of the interview with the plaintiff, on the 29th May, 1860, Frederick Brown and he went to the plaintiff's house together, and there saw the plaintiff and his wife in the bar parlour. No one else, he believed, was in the room. Defendant then introduced Brown to the plaintiff, and observed that he had called about the guarantee bond for 500*l.* After some conversation, the plaintiff asked Frederick Brown, "How long has Millar dealt with you?" Frederick Brown said, "About two years." Defendant then observed, "Ever since I have been in the baking business." The plaintiff then said to Frederick Brown, "It is a great pity that an old friend should lose a good job like this for the want of a friend; you say he has dealt with you two years; does he owe you any money now?" or to that effect, and the said Frederick Brown then answered, "No." The plaintiff then said, "Well, upon that I will sign it," or to that effect, and accordingly did so. The bond was not read over, and the plaintiff immediately left, being apparently in a great hurry.

The defendant Millar further deposed that, from the delay occasioned by the demand for securities on

the part of Brown and Moore, he was greatly pressed to get the first batch of bread supplied to the barracks by the 1st of June. The bread sent out on the 1st June was free from any admixture of rice. He did not obtain any rice to mix with the flour until about ten days after the contract was signed, and he consequently found the contract a losing one. At the expiration of about a fortnight he found himself unable to pay for the rice, and unable to fulfil the contract; and the contract was ultimately cancelled. He further said that Brown and Moore did not at any time supply him with any flour for the purpose of the contract according to the terms of the twelfth condition, except the first ten sacks sent in by them. The flour afterwards supplied defendant believed was of an inferior quality called No. 2, and made, as he believed, of red wheat without mixture of white, and not dressed through wire No. 60. By reason of the supply not being equal to the sample, defendant found himself unable to work the contract, except at a loss of forty sacks of flour a week.

Frederick Brown deposed that, when he and Millar called at the plaintiff's house on the 29th May, the plaintiff said, "Well, I suppose you have come about the bond, Mr. Brown;" to which deponent answered, "Yes, here it is; will you read it over?" and handed it to him. The plaintiff thereupon carefully and attentively read over the bond and condition, and then said, "Well, I have no objection to sign it." Deponent positively denied having said "No" to any such question as stated in the bill, and said that the plaintiff never made any inquiry on the point. He further said that the plaintiff's wife was not present during the whole interview, but that she came in just as the plaintiff had finished reading the bond. He wholly denied that any representations were made by him to the plaintiff on behalf of Brown and Moore.

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The defendant Millar on cross-examination, when asked how he came not to tell his friend Mr. Blest that he then owed Brown and Moore something, replied, "I was perfectly content if Frederick Brown was." He was then asked why he supposed Mr. Blest asked the question. He replied, "I suppose that he asked the question to see that everything was safe." On being asked how it was that he did not say that the conditions on which (as he said) Mr. Blest consented to sign did not exist, he replied, "Because, if I had told him what Frederick Brown and I knew, he would not have signed the bond."

The defendants Brown and Moore wholly denied the conversations respecting adulteration on all occasions, and affirmed that Millar never ventured in the remotest manner to hint to W. Brown any intention of mixing or adulterating their flour; that had he done so they would have declined to enter into the arrangement, knowing that the result would have been the cancelling of the contract and the loss of their money. They wholly denied having contracted with Millar in the terms of the Government conditions, because their contract was entered into in entire ignorance of the stipulations of the twelfth or any other condition, and they were never produced or brought to their knowledge in any way.

On the 21st March last an injunction was granted to restrain the proceedings at law on the bond, on the terms of the plaintiff paying 500*l.* into court; and the cause now came on upon motion for decree.

Argument.

Mr. *Malins* and Mr. *Haig*, for the plaintiff, submitted that there had been a material misrepresentation by the defendants Brown and Moore, the effect of which in this Court was to relieve him from the obligation into which he had entered on the faith of such misrepresentation.

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Mr. *Greene* and Mr. *Nalder*, for the defendant Millar, asked for his costs. It was the inferior flour supplied that had been the real cause of this litigation.

Argument.

Mr. *Bacon* and Mr. *Southgate*, for the other defendants, submitted that the case made by the bill was a case of fraud, which the plaintiff had entirely failed to prove, and therefore must not now be permitted to set up a second case. They submitted that the alleged misrepresentation was disproved, and also that they had not agreed to supply the defendant Millar with such flour as was specified in the contract, but simply with flour in the ordinary way.

THE VICE-CHANCELLOR:—

Judgment.

The plaintiff's case is, that he is a surety; and it is quite a settled principle in this Court that, if any misrepresentation was made or any important fact concealed which could influence the conduct of the surety in executing the bond, he is entitled to be relieved against the bond so executed by him as surety under such circumstances.

The bill states, that, upon the occasion of the meeting for the purpose of executing the bond, the plaintiff asked Frederick Brown, the agent of the co-defendants Brown and Moore, whether at that time the defendant, Millar, for whom he was about to become security, was indebted to Brown and Moore, and Frederick Brown, it is alleged, answered that Millar was not indebted to them. Frederick Brown being the agent of the defendants Brown and Moore, they are affected by any misrepresentation which he might have made.

The question now is, whether, upon the weight of the evidence on both sides, the plaintiff has proved that Frederick Brown made the alleged misrepresen-

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tation. On the one hand, Frederick Brown positively denies that any such question was asked or any such answer was given. On the other hand, the plaintiff and the plaintiff's wife and the defendant Millar all concur in swearing that the question was asked of Frederick Brown, and that he answered that Millar was not indebted to Brown and Moore. Notwithstanding the preponderance in number of the witnesses, the defendants Brown and Moore urge that the weight of testimony is in favour of what has been sworn to by Frederick Brown, and that the character and situation of the other witnesses are such as to affect their testimony in such a manner as that Frederick Brown's testimony ought to be believed rather than that of the other three persons. As to the defendant Millar, there is no doubt that his testimony is justly exposed to the observations which have been made upon it, for Millar, who swears that this question was asked and answered by Frederick Brown in the negative, was present, and knew that the alleged answer by Frederick Brown was a falsehood, and, on being cross-examined upon the subject, Millar admits that he knew it was a falsehood, but did not notice the falsehood because he felt that if he had done so the plaintiff would not have executed the bond.

Therefore Millar's testimony is unquestionably exposed to the severe observations which have been made as to the degree of credit to be given to it. But the law now admits as evidence the oath of the plaintiff and his wife, and their statements are so clear and positive, and so entirely free from any objection on the ground of credibility, that I feel bound to say, upon the weight of their evidence, that the plaintiff has proved his case. The question put by the plaintiff was an extremely probable one, and the reason for the falsehood stated by

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Frederick Brown, and acquiesced in by the defendant Millar under the circumstances in which he was placed, was not unnatural. Upon this part of the case, the plaintiff as surety, having executed the bond upon a misrepresentation of a material fact, is entitled to be relieved and to have the bond cancelled.

It would not be necessary to go further into the matter, but another question of some importance has been argued. The bond which the plaintiff executed was to secure to the defendants Brown and Moore monies which might become due to them from Millar for flour to be supplied by them to Millar, and the purpose for which the flour was to be supplied is distinctly stated on the face of the bond. The bond sets forth that Millar had applied to Brown and Moore to be supplied with flour to enable him to carry out such contract—viz., the contract with the Government, previously mentioned; and that Brown and Moore agreed to do so, and to supply such flour. Those words upon the face of the instrument mean such flour as would enable Millar to perform his contract with the Government. The co-defendants Brown and Moore have put this question beyond all doubt, because the contract with the Government was a contract to supply bread made of flour of the description mentioned in the twelfth condition of the contract. The co-defendants say it is a fact that they never supplied the defendant Millar with any flour for the purpose of the contract with the Government according to the twelfth condition of the printed paper, and that it is also a fact that they never intended to supply Millar with the quality of flour specified in that clause of the conditions, because their contract was to supply him with No. 2 flour. They further say that they were quite ignorant of the terms of the conditions of the contract. But they bound the plaintiff to make pay-

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ment to them of the price of "such flour" as they were to supply to the defendant Millar to enable him to perform his contract, and yet they state they did not do so, because they did not know the terms of the contract. The plaintiff is not bound for anything but those matters mentioned in the stipulations of the bond, and those stipulations were that he should be bound to secure the price of flour which would enable Millar to perform his contract, and the defendants swear that they did not supply Millar with flour of that kind. Upon this ground, therefore, the plaintiff is entitled to relief in this Court. The plaintiff is entitled to have the bond cancelled.

Re THE TRUSTEE ACT, 1850.
Re FINNEY'S ESTATE.

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February 8.

A devise by a testator of all his real and personal estate to his nephews and nieces, who were a numerous and unascertained class, *held* not to pass estates vested in the testator in trust or on mortgage, but that such estates descended to his heir-at-law.

THIS was a petition by the executors of a gentleman, named John Finney, praying that the heir-at-law of the testator might be declared to be a trustee within the meaning of the Trustee Act, 1850, of all lands and hereditaments, and parts or shares of land and hereditaments, vested in the testator by way of mortgage at the time of his death, for an estate of inheritance in fee simple, under or by virtue of the said indentures of mortgage, and that all such lands might be ordered to vest in the petitioner for all the estate of the testator in such lands and hereditaments subject to such equity of redemption as might be subsisting of the same.

The petition stated that John Finney, of Harley, near Bunton, in the county of Derby, made his will, dated the 15th day of June, 1860, whereby, after specifically devising certain lands and hereditaments (not including in such devise any lands or hereditaments vested in him as mortgagee or trustee) and bequeathing divers annuities and pecuniary legacies, the testator made the following disposition:—

"All the residue and remainder of my real and personal estates, not hereinbefore by me disposed of, I give and devise and bequeath the same unto and amongst all my nephews and nieces share and share alike as tenants in common, and not as joint tenants."

The testator then appointed the petitioners his executors. He died on the 23rd November, 1860, seized of divers lands which had become vested in him as mortgagee and as securities for large sums of money.

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There were eight mortgages vested in him as trustee, and twelve in which he was personally interested.

Statement.

The petition alleged that the testator's nephews and nieces were a numerous class of persons, not specifically named or mentioned in the will.

The petitioners submitted that on the true construction of the will the testator died intestate as to the trust estates and estates vested in him on mortgage, and that, as he died without issue, the said estates held on trust and on mortgage vested in his heir-at-law, who it was submitted by virtue of the Trustee Act was a trustee for the petitioners.

Argument.

Mr. *Craig* and Mr. *Prendergast*, for the petitioners, submitted that, as the nephews and nieces were an unascertained class, the estates which the testator held in trust and on mortgage did not pass under the devise.

Judgment.

THE VICE-CHANCELLOR:—

The estates vested in the testator on trust and mortgage do not, in my opinion, pass under a devise to an unascertained class. The order, therefore, will declare the heir-at-law of John Finney a trustee of such legal estate, and direct the same to be vested in the executors for such estates and interests as were vested in the testator himself, to be held by them upon the trusts of the testator's will.

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HEALD *v.* HAY.

February 11.

The statute of the 47 Geo. 3, sess. 2, c. 25, making void the assignment of military pensions, does not apply to a pension granted by the late East India Company.

THE plaintiffs in this case, who were the trustees of the Lancashire Insurance Company, filed their bill against the defendant, Samuel Hay, formerly an officer in the Hon. East India Company's service, who retired from the service in 1855, and thereupon, under an order of the Board of Directors dated the 5th October, 1855, became entitled to a pension of 191*l.* 12*s.* 6*d.* The pension was, as the bill alleged, wholly by way of compensation for his past services.

In the year 1859 the defendant applied to the plaintiffs' Company for a loan of 1500*l.* on the security of his pension, to be accompanied by a policy in the office of the company on his own life for the amount borrowed. The company ultimately agreed to make the required advance, and accordingly, on the 13th October, 1859, they granted a policy on the defendant's life, and paid over the sum of 1500*l.* less the first year's premium and certain expenses.

By deed, dated the 28th November, 1859, and made between the defendant Hay of the first part, and the plaintiffs (the trustees) of the second part, and in consideration of the sum of 1500*l.*, the said pension therein described as "all that pension or annual allowance of 191*l.* 12*s.* 6*d.* per annum, which, under a general order or resolution of the council of directors of the Honourable East India Company, was made on or about the 5th October, 1855, payable to him the said Samuel Hay during his life," and all and every sums and sum of money which should become payable in respect thereof, were assigned by the defendant to the trustees, their executors, administrators, and assigns, with power to sue

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and give discharges for the same. The deed contained a proviso for redemption and reassignment on payment by the defendant of 1500*l.* and interest. It was further declared that the said sum of 1500*l.* was money belonging to the plaintiffs on a joint account in equity as well as at law. The indenture contained a power of sale in default of payment; a covenant for further assurance; and in particular a covenant that during the continuance of the security the defendant would, without delay, after each change of his abode, inform the plaintiffs of his then place of residence, and from time to time make such personal appearances, or otherwise furnish the plaintiffs with such evidence of his being alive as should be necessary to enable the receipt of the premises thereby expressed to be assigned.

Simultaneously with the deed the defendant, in pursuance of the arrangement and as part of the security, executed and delivered to the plaintiffs the trustees a separate power of attorney to receive the same in the name of the defendant.

The bill alleged, that subsequently to the completion of the arrangement the plaintiffs discovered that the pension was subject to a deduction of about 70*l.* a year, which was retained by the Government in India, for the maintenance of a wife and child left by the defendant in India; and was also subject to a deduction of eighteen guineas per annum, payable to the Military Fund. The pension therefore was reduced by such deductions to a sum which was wholly insufficient to pay the interest on the principal sum of 1500*l.*, and the premium payable on the policy of assurance.

The bill further alleged that the plaintiffs also discovered that the defendant, about September or October, 1860, applied to Messrs. Richardson and Co., East India agents, to act as his agents to receive the pension, and

borrowed from them 25*l.*, which they advanced in ignorance of the plaintiffs' security, and that he subsequently gave Messrs. Richardson a power of attorney to receive and retain 25*l.* out of the pension. Messrs. Richardson, having discovered the plaintiffs' power of attorney, entered in communication with the plaintiffs, whereby they, the plaintiffs, discovered that the power of attorney given them by the defendant had been revoked.

The bill also alleged that the defendant was keeping out of the way to avoid service of process, and prayed for a declaration that the assignment of the 28th November, 1859, was a valid and effectual charge or mortgage for the said sum of 1500*l.* and interest; and that the defendant might be restrained by injunction from applying for or obtaining payment of, either by himself or any agent, and from authorizing or empowering or permitting any person other than the plaintiffs, or the receiver to be appointed as thereinafter prayed, to receive or to continue to receive, the said yearly pension of 191*l.* 12*s.* 6*d.*, or any part thereof, or any future or quarterly or other payments which then were or might become thereafter payable on account thereof, and from executing any other power of attorney to any other person than the plaintiffs or such receiver, or permitting any such other power given by him subsequently to the power given to the said plaintiffs as aforesaid to continue in force as against the plaintiffs. The bill also asked for a receiver, and that the defendant might be decreed specifically to perform the covenant for further assurance and other covenants in the indenture of the 28th November, 1859, and in particular to make, do, execute, and concur in all such new and other powers of attorney, authorities, &c., as might be necessary or convenient for giving full effect to the assignment and the rights of the plaintiffs thereunder, or for enabling them to receive or obtain payment of all

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the future payments thereof, and might be ordered to make personal appearance.

Statement.

On the 20th of February, 1861, the Vice-Chancellor granted an injunction to restrain the defendant from receiving the pension, &c. The case now came on motion for a decree.

Argument

Mr. *Everitt Everitt*, for the plaintiffs, said the question now was whether the assignment of a pension granted by the East India Company was void under the 4th section of the 47 Geo. 3, sess. 2, c. 25, or in other words whether that statute applied to pensions granted by the East India Company. In the case of *Knight* v. *Bulkeley* (*a*), the Court had given effect to the assignment of a pension by an officer in her Majesty's service, but at that time the 47 Geo. 3, sess. 2, c. 25, was not called to his Honour's attention, and was in fact not generally known; subsequently, however, in the case of *Lloyd* v. *Cheetham* (*b*), his Honour overruled the case of *Knight* v. *Bulkeley*. Under that statute the assignment by a retired military officer in the Queen's service of his pension was held void, and the Court in that instance refused an injunction to restrain the officer from applying for the pension. The language of the statute (s. 4) is as follows:—"All assignments, bargains, sales, orders, contracts, agreements, or securities whatsoever, which shall be given or made by any person entitled to any such pay, pension, allowance, or relief, as aforesaid, for, upon, or in respect of any such his pay, pension, allowance, or relief, shall be absolutely null and void to all intents and purposes." In a preceding part of the statute, section 1, the pay and pensions "aforesaid" were described in these terms—"All such pay, pensions, and allowances to which any officers or

(*a*) This case was not reported because of the subsequent decision of *Lloyd* v. *Cheetham*.

(*b*) *Antè*, 171.

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persons who have served in any of his Majesty's forces, or in any forces which have been heretofore or may hereafter be engaged in his Majesty's service." It was submitted that the Acts relating to India contained no such clause as the above; also that, although the military forces of the East India Company had now been transferred to her Majesty by the Act of 1858, the rights of all pensioners were reserved by that statute (*a*). On the whole case it was submitted that the assignment was valid, and the plaintiffs were entitled to a decree on the terms of the prayer of the bill.

Argument.

The defendant did not appear.

THE VICE-CHANCELLOR:—

Judgment.

It seems that the 47 Geo. 3, c. 25, has no application to a pension granted by the late East India Company,

(*a*) The two sections of the late Act, 21 & 22 Vic. c. 106, which appear to relate to this question, are as follows:—

Section 56. "The military and naval forces of the East Company shall be deemed to be the Indian military and naval forces of her Majesty, and shall be under the same obligations to serve her Majesty as they would have been under to serve the said company, and shall be liable to serve within the same territorial limits only, for the same terms only, and be entitled to the like pay, pensions, allowances, and privileges, and the like advantages as regards promotion and otherwise, as if they had continued in the service of the said company."

Section 58. "All persons who at the commencement of this Act shall hold any offices, employments, or commissions whatever under the said company in India, shall thenceforth be deemed to hold such offices, employments, and commissions under her Majesty as if they had been appointed under this Act, and shall be paid out of the revenues of India; and the transfer of any person to the service of her Majesty shall be deemed to be a continuance of his previous service, and shall not prejudice any claims to pension, or any claims on the various annuity funds of the several presidencies in India which he might have had if this Act had not been passed."

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and the plaintiffs are entitled to the relief they ask, and there must be a perpetual injunction against the defendant. The order was as follows:—This Court doth order and decree that the injunction granted in this cause dated the 20th February, 1861, to restrain the defendant, his servants, &c., from applying for or obtaining payment of, and from authorizing any person other than the plaintiff or a receiver to be appointed to receive the yearly pension of 191*l.* 12*s.* 6*d.*, or any part thereof, or any future quarterly or other payments which now are or may become hereafter payable on account thereof, and from executing any other power of attorney to any other person than the plaintiff or such receiver, or permitting any such other power given by him subsequently to the power given to the plaintiffs, as in the plaintiffs' bill mentioned to continue in force as against the plaintiffs. And the plaintiffs by their counsel consenting thereto, it is ordered that B. F. Oliver, of 10, Cornhill, &c., &c., he undertaking to act without salary and to enter into his own recognizances to be settled by the judge duly to account for all and every the sum and sums of money which he shall receive for and in respect of the arrears and pension hereinafter mentioned or referred to, be and he is hereby appointed to receive the arrears if any of the said pension, and all future payments of the said pension from time to time as the same shall become payable until the said sum of 1500*l.* and interest and other the said monies shall have been fully paid and satisfied. And it is ordered that the defendant Samuel Hay do specifically perform the covenant for further assurance, and after the covenant contained in the indenture of the 28th November, 1859. And it is ordered that the defendant Samuel Hay do from time to time do, make, and execute, and concur in all such new and other powers of attorney, authorities, receipts, deeds,

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assignments, and assurances as may be necessary or convenient for giving full effect to the said assignment and the rights of the plaintiffs hereunder, or for enabling the said receiver or any other receiver to be appointed in this cause to receive or obtain payment of all such arrears of such pension, if any and of the future payments of or in respect of the said pension. And it is ordered that the defendant Samuel Hay do from time to time make such personal appearance or furnish such evidence of his being alive as shall be necessary to enable the receiver or any future receiver to be appointed in the cause to receive the said pension. Tax plaintiffs' costs to be paid by the defendant Samuel Hay. Liberty to apply.

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Where the lessee of a factory, under a covenant with his lessor to keep the premises insured in the Alliance or such other office as the lessors should appoint, executed an underlease to the plaintiffs whereby the plaintiffs covenanted to pay any sum or sums of money expended in fire insurance, and in the erroneous belief that the premises (which were empty) were used for a hazardous trade paid 26*l.* 5*s.* per cent. for insurance in another office, and sought to recover the amount at law against the underlessee, the Court restrained the action upon the plaintiffs undertaking to pay the amount of premium which was found to be properly payable, and made the defendants pay the costs of the suit.

BY an indenture of lease, dated the 27th of June, 1850, between the Guardians of the Poor of the West Ham Union, Essex, of the one part, and the defendant George Pratt, of the other part, a piece of land and buildings thereon, were demised to George Pratt, his executors, administrators, and assigns, for the term of fifty-five years, from the 29th September, 1849, at the yearly rent of 65*l.*, payable quarterly; the said George Pratt also paying to the guardians, "as or in the nature of an additional rent or additional rents, all such sum or sums of money, costs and expenses, as the said guardians should or might pay or expend in or about the insurance of the said demised premises, or any part thereof, against loss or damage by fire as therein after mentioned." Then followed a covenant for the payment of rent, and then the following as to insurance:—

"That he, the said George Pratt, his executors, administrators, or assigns, would at his or their own costs and charges, insure and keep insured during all the term thereby granted, the messuages, erections, and buildings, for the time being erected or standing on the said demised premises, in such sum and sums of money as the surveyor for the time being of the said guardians, their successors and assigns, by any writing under his hand should at any time or times name and appoint, in the joint names of the said George Pratt, his executors, administrators, and assigns, and of the clerk for the time being of the said guardians, their successors or assigns,

or of such other person or persons as the said guardians, their successors or assigns, should from time to time appoint, in the Alliance Insurance Office, or such other office for insurance against fire, in London or Westminster, as the said guardians, their successors or assigns, should from time to time appoint, and would upon the request of the said guardians, their successors or assigns, or of their clerk for the time being, or of any other person or persons duly authorized by them, produce and show the policy or policies for such insurance, and the receipt for the premium and duty thereon for the then current year; and in case the said George Pratt, his executors, administrators, or assigns, should make any default in effecting or keeping up such insurance as aforesaid, or in producing and shewing the policy or policies for such insurance, or the receipt or receipts for such premium and duty as aforesaid, then and in any or either of the said cases the said guardians, their successors or assigns, should be at liberty to insure and keep insured, during all the then residue of the term thereby granted in such joint names and in such sum or sums of money as aforesaid, the said messuages, erections, and buildings, or such of them as should not be so insured, or in respect whereof such policy or policies, receipt or receipts, should not be so produced, and the said George Pratt, his executors, administrators, or assigns, would on demand pay to the said guardians, their successors or assigns, all and every sum and sums of money, costs, charges, and expenses which they should or might pay or expend in or about the effecting and keeping up any such insurance as aforesaid, and in case of default in payment thereof the same should be recoverable as rents under the reservation thereinbefore in that behalf contained; and in case the said messuages, erections, and buildings, or any of them or any part thereof respectively, should during the said term thereby granted,

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be destroyed or damaged by fire, then and so often as the same should happen, all the monies which should be received by virtue of any such insurance or insurances as aforesaid should be laid out forthwith in rebuilding or repairing and reinstating the same messuages, erections, and buildings, or such of them as should be so destroyed or damaged, under the absolute control and direction of the said guardians, their successors or assigns, and if such monies should be insufficient for that purpose, then the deficiency should be made good by the said George Pratt, his executors, administrators, and assigns; and in case of any loss or damage by fire as aforesaid the said George Pratt, his executors, administrators, or assigns, should not have nor be entitled to any abatement out of his rent in respect or on account thereof. And in the said indenture of lease was contained a proviso, and it was thereby declared and agreed by and between the parties thereto, that if it should happen that the said yearly rent or sum of 65*l.* or any part thereof should at any time or times be behind or unpaid by the space of twenty-one days next after any or either of the said days of payment whereon the same ought to be paid as aforesaid, although no demand thereof should have been previously made, or the said guardians, their successors or assigns, or other the person or persons entitled as aforesaid, should have distrained for the same, or if the said George Pratt, his executors, administrators, or assigns, should at any time fail or neglect to insure and keep insured the messuages, erections, and buildings for the time being erected or standing on the said demised premises, or upon such request as aforesaid to produce and shew the policy or policies for such insurance, or the receipt or receipts for the premium or premiums and duty thereon for the then current year, pursuant to his covenant in that behalf thereinbefore

contained, although the said guardians, their successors or assigns, might have insured the said messuages, erections, and buildings, or any of them, under the provisions in that behalf thereinbefore contained, and might have distrained for the sum or sums of money, costs, charges, and expenses which they might have paid or expended in or about the effecting and keeping up any such insurance or insurances as aforesaid."

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By an indenture of lease, dated the 28th September, 1855, made between George Pratt of the first part, and the defendant John Bressey of the second part, and Nathaniel Shattswell Dodge, Lathrop Solomon Bacon, and Raphaelo Louis Giondonati, trading under the style of "Dodge, Bacon and Co," of the third part, it was witnessed that in consideration of the rents and covenants thereinafter reserved, and of the monies expended by the parties of the third part in new buildings and improvements erected and made by them, all and singular the premises, &c. &c., were demised to the said parties of the third part, to hold the same with the appurtenances to the said parties of the third part for the term of twenty-one years, from the 24th June, 1855, at the yearly rent of 305*l.*, payable as therein mentioned, and also paying unto the said John Bressey his executors, administrators, and assigns, as in the nature of an additional rent, all such sum and sums of money as the said John Bressey, his executors, administrators, or assigns, should pay in or about the insurance of the said demised premises, or any part thereof, against loss or damage by fire, the said sum or sums to be paid from time to time on such one of the days thereinbefore appointed for the quarterly payment of the said rent as should happen next after any such sum or sums of money should have been paid or expended. And in the said indenture of lease was contained a covenant by the said

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parties thereto of the third part, for themselves, their heirs, executors, and administrators jointly, and any two of them, for themselves, their heirs, executors, and administrators jointly, and each of them for himself respectively, and for his respective heirs, executors, and administrators, with the said John Bressey, his executors, administrators, and assigns; and also as a separate covenant with and to the said George Pratt, his executors, administrators, and assigns, to pay the said rent of 305*l.* as aforesaid, and also any sum or sums of money expended for the insurance of the said premises against fire as aforesaid. And in the said indenture of lease was contained a proviso, that if the said rent of 305*l.* or any part thereof should be unpaid for twenty-one days next after any or either of the days of payment whereon the same ought to be paid, it being first lawfully demanded, upon or after the expiration of the said twenty-one days, and not paid when so demanded, or if the parties thereto of the third part, their executors, administrators, or assigns, should in any manner neglect or fail to perform, observe, fulfil, and keep all and every or any of the covenants, clauses, provisoes, and agreements therein expressed and contained and on their part to be observed and kept, or if they should without the consent in writing of the said John Bressey, his executors, administrators, or assigns, assign, set over, underlet or otherwise part with the said premises or any part thereof for all or any part of the term thereby granted, or if the said parties thereto of the third part should become and be duly adjudged bankrupt, or should take the benefit of any statute for the relief of insolvent debtors, or should make any compromise with their creditors for less than 20*s.* in the pound, or should suffer the said indenture to be taken in execution by the sheriff under any writ of execution, then and from thenceforth and in any or either of the said cases it should

be lawful for the said John Bressey, his executors, administrators, and assigns, into or upon the said premises thereby demised or any part thereof in the name of the whole to re-enter and the same to have again, retain, repossess, and enjoy, and the said parties thereto of the third part, their executors, administrators, and assigns, and all other tenants and occupiers of the said premises thereout and from thence utterly to expel, put out, and amove, anything thereinbefore contained to the contrary thereof in anywise notwithstanding. And in the said indenture was also contained a covenant by the said John Bressey, so far only as related to the acts and deeds of himself, his executors and administrators, and by the said George Pratt, for himself, his executors and administrators, with the said parties thereto of the third part, for quiet enjoyment of the said demised premises, on payment of the said rent of 305*l.* and such further sum or sums as aforesaid in respect of the insurance of the said premises against fire, and on performance of covenants. And in the said indenture was contained a covenant by the said George Pratt, for himself, his executors, administrators, and assigns, with the said parties thereto of the third part, their executors, administrators, and assigns, that he the said George Platt, his executors, administrators, and assigns, would thenceforth pay the rent reserved by the lease thereinbefore mentioned to have been granted to the said George Platt, and would keep the said parties thereto of the third part, their executors, administrators, and assigns, indemnified against the payment of the same rent, and against any losses and expenses in consequence of the non-payment thereof, or any part thereof; and further, that he the said George Pratt, his executors, administrators, or assigns, would thenceforth keep the said demised premises insured against loss or damage by fire in manner prescribed by the aforesaid lease to the

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said George Pratt, and would from time to time produce to the said parties of the third part, their executors, administrators, and assigns, the policy or policies of such insurance, and the receipt or receipts for the payment of the sums necessary for keeping such insurance on foot, and that the monies which should be received by virtue of any such insurance should be forthwith laid out in rebuilding and reinstating the said premises, or such parts thereof as should be destroyed or damaged by fire; and that if such monies should be insufficient to rebuild and to reinstate the said premises, the said George Pratt, his executors, administrators, or assigns, should supply the deficiency.

By an indenture of assignment, dated the 25th September, 1857, between the said N. S. Dodge, L. S. Bacon, and L. Giondonati of the first part, the defendant George Pratt of the second part, the defendant John Bressey of the third part, and the plaintiffs the Leather Cloth Company (Limited) of the fourth part, in consideration of 100*l.* paid by the plaintiffs to the parties of the first part, the premises were assigned by the parties of the first part to the plaintiffs, for all the residue of the said term of twenty-one years, in further consideration of the payment by the plaintiffs of the said rent of 305*l.*, and of the observance and performance of the covenants and conditions contained in the indenture of under-lease. In the said indenture was contained a covenant by the plaintiffs with the parties of the first part, for payment of the rent and for performance and observance of the said covenants and conditions.

The under-lease and assignment were each made in pursuance of a licence from the guardians, and their consent to the assignment was given by a deed-poll dated the 24th September, 1857, under the seal of the guardians and signed by Pratt, on the express condition that in

case the defendant Pratt should at any time thereafter make default in payment of rent or observance and performance of all or any of the covenants contained in the lease of the 27th June, 1850, it should be lawful for the guardians to re-enter and eject the defendant Pratt, and also the plaintiffs and all other persons, in pursuance of the powers of re-entry in the original lease.

The bill alleged that from the granting of the lease of the 28th September, 1855, up to the date of the assignment, the premises were occupied by Messrs. Dodge, Bacon, & Co. as a factory for the manufacture of leather cloth, and the lease was purchased by the plaintiffs with the full knowledge, as the bill alleged, of the defendants' intention of using them for the same purpose.

Previously to the assignment of the 25th September, 1857, the defendant Pratt effected an insurance in the Anchor Office, which, being allowed to drop at Christmas, 1858, the guardians on the 1st April, 1859, served a writ in ejectment on the plaintiffs, but the defendant Pratt obtained leave to appear. The breaches assigned were—

1. For not continuing the insurance in the Alliance in the joint names of George Pratt and William James Barsham.
2. For not insuring the premises on divers other days, &c.
3. For not producing when demanded the policy, &c.
4. For not producing, &c., the receipt.

The bill alleged that at the commencement of the proceedings in ejectment the factory was insured in the State Office at an annual premium of 64*l.* 15*s.*, being at the rate of 3*l.* 4*s.* 9*d.* per cent. The plaintiffs, however, refused to pay the premium on the ground that, as it was without the sanction of the guardians, it was not a defence to the ejectment. Pending these proceedings a fire took place, and the guardians, in order to obtain the benefit of the insurance in the State Office, agreed to

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forego further proceedings, but on the distinct stipulation that such recognition should not prejudice their right to have the premises insured in the "Alliance." The assurance having expired on the 25th March, 1860, the defendants effected a fresh insurance in the same office for the sum of 2000*l.* for the year ending the 25th March, 1861. The plaintiff's solicitor, Mr. Murray, on the 26th of March, 1860, wrote both to Mr. Pratt and to his solicitors, inquiring whether there was any subsisting policy on the factory, and was told in reply that the insurance when completed would be at the rate of twenty-five guineas per cent.; immediately on the receipt of the letter he wrote to Messrs. Clark and Morice, the defendant Pratt's solicitors, to the effect "that if Mr. Pratt had done so absurd an act as to pay twenty-five guineas per cent. for insurance, he had done so at his own peril." The plaintiffs alleged that they always repudiated their liability in respect of the premiums, but, being desirous of knowing the precise terms on which the said policy was effected, their solicitor obtained after some delay the following statement:—

"Policy No. 8724, from Lady Day, 1860, to Lady Day, 1861.

"George Pratt, of 21, Upper Barnsbury-street, Islington, and William James Barsham, clerk for the time being to the Guardians of the West Ham Union.

"On building of their cotton-room and two sheds all adjoining and communicating, no artificial light or heat therein, marked A. A. A. A. on a plan deposited with the office . . . £50

"Building of counting-house near, with a cellar underneath used as a washhouse only, marked B. on said plan 50

"Workshop and drying-room communicating near, marked C. on said plan	£300
"Workshop and drying-room communicating with each other, and adjoining last mentioned, marked D. on the said plan	300
"Workshop and drying-room, all communicating with each other, and adjoining last mentioned, marked E. on the said plain	600
"Workshop adjoining, but not communicating with last mentioned, marked F. on the said plan	300
"Workshop and drying-room, all under one roof, adjoining and comunicating with E., and marked G. on the said plan	200
"Workshop of three stairs in height, marked A. on the said plan	50
"Building of three cottages in equal proportions near, marked I. I. I. on the said plan, brick and timber built	150
	£2000

"Mem.—The above are all brick built, and tiled or slated except otherwise mentioned, situate West Ham, Essex, and used for the manufacture of the leather cloth; warranted that there be no artificial light or heat within the building; that all drying be by steam only. Machinery driven by steam from boiler outside adjoining C. and D. That there be no oil or varnish prepared or heated within the building, all colours being prepared and mixed in a building marked J. on the said plan, and known as the colour-house, to which this insurance does not extend.

"There being hot-water pipes in addition to steam-

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pipes within the building, the same is hereby allowed without prejudice to this policy.

"H. CLARK.	DEMYS.		BAKER.
"Premium . .	£525	0	0
"Duty . . .	3	0	0
	£528	0	0

"Ext. T. E. BIRD."

The bill alleged that from the date of the fire the plaintiffs had wholly ceased to occupy the factory for their business. The bill further alleged that on the 25th March, 1861, the defendant George Pratt had himself effected an insurance in the Alliance Office for 2000*l.*, at an annual premium of 5*l.* 12*s.* 9*d.*

On the 26th February, 1861, the defendant Bressey commenced an action for 228*l.* 15*s.*, being rent for three quarters of a year up to Christmas, 1860, and for 528*l.*, described as—"To amount paid for insurance of premises at West Ham, assigned to the defendant from the 25th March, 1860, to the 25th March, 1861."

The plaintiffs paid into court the amount of rent, 228*l.* 16*s.*, and their solicitor sent to the defendant the following letter:—

"7, Whitehall Place, 4th April, 1861.

"Dear Sir,

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"You will observe that under the second plea now delivered I have paid into court 228*l.* 16*s.* This is to meet the plaintiffs' claim for rent. With respect to the claim for insurance I at the same time beg leave, on behalf of the defendants, to be understood as now offering upon the action being discontinued to pay to the plaintiffs the sum of 5*l.* 12*s.* 9*d.*, being the amount of premium at

which an insurance could have been effected on the premises in the Alliance Office from 25th March, 1860, till March, 1861, as being then as now unoccupied, and to pay the plaintiffs' costs of the action.

"The defendants are advised that, as regards the claim of 528*l.* for insurance, their defence is in equity, and a bill is now in course of preparation, which will be put upon the file immediately, in the event of the offer made by this letter not being accepted.

"I am, dear Sir, yours truly,

(Signed) "JOHN MURRAY."

The defendants having refused to accept this offer, the plaintiffs filed their bill, praying that under the circumstances, and on the true construction of the several indentures of the 28th September, 1855, and of the 25th day of September, 1857, and of the covenants and provisoes therein, it might be declared that the plaintiffs were not liable to pay to defendants Bressey and Platt, or either of them, the said premium of 528*l.*, and if necessary that it might be declared that the plaintiffs were not liable to pay any monies in respect of any premiums effected, otherwise than in accordance with Pratt's covenant of the 27th June, 1850.

The defendants by their answer to the bill alleged that at Michaelmas, 1855, after the fire had occurred, the Alliance Insurance Company, after some correspondence, sent to the defendant George Pratt the following letter:—

"Alliance Insurance Office, 8th November, 1855.

"Sir,

"In reply to your letter of the 6th, I regret to have to inform you that the directors are precluded from resuming the insurance of your premises at West Ham, by the hazardous risk involved in the processes about to be carried on in the manufactory.

"I am, &c. "F. A. ENGLEBACH,

"Actuary and Secretary."

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That on such refusal the defendant George Pratt applied to the North of England Insurance Company, and induced them to insure for 2200*l.* at a premium of 2*l.* 2*s.* per cent. down to the 25th December, 1857, when the secretary wrote to him as follows: — "I much regret to inform you that the directors of this company decline to renew the policy, on account of the very hazardous nature of the trade carried on. Our risk will therefore cease on the 25th instant." And in a subsequent letter the directors declined to renew the policy at an increased premium. The defendant George Pratt ultimately insured the premises with the Bank of London Insurance Company from Christmas, 1857, for 3000*l.*, at a premium of 3*l.* 3*s.* per cent.; but, certain alterations having been made in the works, the company contended that the policy was invalidated, a determination in which they persisted after some correspondence. Under these circumstances the defendant's solicitor wrote to the plaintiffs, stating the circumstances of the case, and calling on them "so to alter the premises as to enable Mr. Pratt at once to effect an insurance to the satisfaction of the superior landlords, or to invest in Consols a sufficient sum to meet the risk of fire. A long correspondence ensued which resulted in nothing. The defendant Pratt then applied to the London and Liverpool Fire Assurance Company to grant a policy, which the manager refused even if paid ninety-nine per cent.; the consequence was the premises remained uninsured until February, 1859, when the said George Pratt effected an insurance for 2000*l.* at a premium of 64*l.* 15*s.*, being at the rate of about 2*l.* 15*s.* per cent. On the 3rd June, 1859, a fire occurred which burnt down a great part of the factory. An action of ejectment was subsequently brought by the guardians, but it was ultimately arranged. In January, 1860, the defendant George Pratt, fearing that the State Fire Insurance Company would refuse to

renew the policy, applied to the Sun, the Leeds and Yorkshire, the Royal Fire, and the Globe Assurance companies, who all declined to insure the factory.

The 34th paragraph of the answer was as follows:—

34. Finding no other office willing to grant a policy on the said premises, and the said State Fire Insurance Company having expressly refused to renew their policy on the same terms, this defendant, George Pratt, was compelled to offer to pay an increased rate of premium, and after much negociation and discussion, and the said last-mentioned insurance company having taken time to consider the matter, they agreed to grant a renewal of the said policy at an annual premium of twenty-five guineas per cent., being the lowest price at which they were willing to undertake the risk; and, from the circumstances hereinbefore appearing, not being able to effect any insurance on the said premises except with the said State Fire Office, this defendant George Pratt paid them for premium and duty the sum of 528*l.*, and the said premises were accordingly insured in the said State Office for the sum of 2000*l.* during the year ending 25th day of March, 1861. And I, George Pratt, say, and I, John Bressey, verily believe it to be true, that such payment was made by this defendant George Pratt, with the most perfect good faith, and without collusion with the said insurance company, or any person or persons whomsoever, and without the slightest understanding that any portion of such premium was in any event to be returned to this defendant George Pratt, or any person or persons on his behalf.

The defendants admitted that the renewed policy with the State Office in March, 1860, was made without previous communication with the guardians or with the plaintiffs; but they said that Mr. Barsham, the clerk of the guardians, called at the office of the State, soon after Lady Day, 1860, and inquired whether Mr. Pratt had

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effected the insurance of the premises, and was informed that, subject to the acceptance of the same by the company, the same had been effected. The defendants said they believed that the plaintiffs, upon being informed that the policy had been effected, did protest, but not until the premium had been actually paid; and "they perfectly well knew (as the fact was) that strict compliance with the covenants was rendered impossible by the conduct and negligence of, and the alterations made by, the plaintiffs." At the time of such insurance the factory was fitted up with hot-water pipes in addition to steam-pipes, and the premises were "capable of being used" by the plaintiffs for the purposes of their business. They believed the memorandum was substantially correct. They said the guardians had expressly recognised the State policy then existing, and never objected to it, or to its renewal or continuance, although they well knew of its existence, except so far as by the notice of the 5th July, 1860. They alleged that the guardians had received rent payable by the defendant Pratt up to Christmas, 1860, well knowing that no policy had been effected with the Alliance Company, and had thereby acknowledged the lease as valid and subsisting. They denied the breaches of covenant, on the ground of the insurances having all been accepted by the guardians, and of their acceptance of rent; and submitted that, if there was any continuing breach on the part of Pratt, the breach of his covenant with the guardians could not affect the liability of the plaintiffs on the covenants contained in the under-lease and assignment. They contended their claim was not unreasonable, the plaintiffs having, by their acts, rendered it impossible to effect an insurance at a lower premium; that there was a desire on the part of the plaintiffs to get rid of the lease under which the new factory was held, and to cause a forfeiture by preventing the defendant Pratt from fulfilling his

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covenant to insure; that the conduct of the plaintiffs was vexatious and oppressive; and that their remedy (if any) was at law. It appeared that the plaintiffs refused to bind themselves not to use the premises in any way they might think proper.

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On the 27th of June the motion for an injunction was made, and ordered to stand over to the hearing of the cause, the plaintiffs undertaking to give judgment in the action, the defendants not to register the same or issue execution until further order, and the plaintiffs undertaking to give notice of motion for decree within fourteen days.

The plaintiffs in their original bill having alleged (paragraph 21) that the defendant Pratt was an agent in the State Assurance Office, and that there was some private stipulation between him and the State Company; and these allegations having been wholly disproved on the evidence, the plaintiffs on the 27th June obtained leave to amend the bill; and on the 18th of July the same was amended by striking out the 21st paragraph.

Argument.

Mr. *Malins*, with Mr. *W. P. Murray*, for the plaintiffs. —The only premiums for which the plaintiffs are liable are those paid in conformity with the terms of the lease; that was in respect of an insurance effected with the sanction of the guardians. The defendants did not even pretend that this was so sanctioned, because, by the 37th paragraph of their answer, they admitted "that it was effected without any previous negotiation with the guardians or with the plaintiffs." Secondly, it would be contended, that the plaintiffs were bound to pay any sum paid by Pratt for insurance; but that must mean any reasonable sum paid by Pratt; but if Pratt had inquired he would have ascertained that at the time he was paying such an exorbitant premium the factory was

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not being used for any hazardous trade or business whatever.

Argument.

Mr. *Greene*, and Mr. *Bowring*, for the defendants.—The question raised in this suit was properly cognizable by a court of law. The equity in the case was the agency and private bargain of Pratt, but that had been abandoned by the amendment of the bill in striking out the 21st paragraph.

On the construction of the covenants the plaintiffs were bound to indemnify Pratt to the fullest extent, and this Court would not interfere to limit the plaintiffs' liability, more especially as the difficulty under which Pratt found himself was occasioned by the plaintiffs' alteration of the premises in such a manner as to invalidate the subsisting policy.

Again, there was a covenant on the part of the plaintiffs, repeated by Mr. Murray's letter, to pay whatever sum Pratt paid for insurance of the premises, which it was the interest of the plaintiffs themselves to have insured to avoid forfeiture of their lease. The evidence clearly showed that Pratt could not insure the premises at a less rate.

On the question of breach of covenant they cited the following:—*Croft* v. *Lumley* (*a*), *Doe dem. Muston* v. *Gladwin* (*b*), *Platt on Leases* (*c*), *Doe dem. Darlington* v. *Ulph* (*d*), *Penniall* v. *Harborne* (*e*), *Chambers on Leases.*

On the whole case it was submitted there was no ground for the interposition of the Court.

Judgment.

THE VICE-CHANCELLOR:—

It is said that the question in this case ought to be

(*a*) 6 H. of L. C. 672—720.
(*b*) 6 Q. B. 953.
(*c*) 220, citing *Doe dem. Pitt* v. *Shewin*, 3 Camp. 134.
(*d*) 13 Q. B. 204.
(*e*) 11 Q. B. 368.

decided in a court of law. But the action which has been restrained was brought by the defendant John Bressey, who is nominally the plaintiff, but has no interest in the question.

The action is brought upon a covenant in a lease, and the plaintiff at law is a mere trustee, and suing on behalf of his co-defendant in this suit who is *cestui que trust.* There are questions connected with the conduct of the parties, in relation to the construction of the covenants, which are eminently unfit for the decision of a court of law. It is said that the proper remedy for the plaintiffs would have been a cross action. But it is not the course of the Court to refuse its jurisdiction upon questions of contract where considerations of conduct are involved. Therefore I have no doubt upon the amended bill that the Court has jurisdiction in this case, and that it is the province of this Court to deal with such a case.

Upon the merits the defence has wholly failed. The plaintiffs hold the property under a title derived from the underlessees of the defendant Pratt. Pratt, who granted the underlease to which the plaintiffs are now entitled, was bound by a covenant to insure, expressed with unusual clearness and with great stringency. The terms of the covenant which binds Pratt, and the nonperformance of which might be fatal to the rights of the plaintiffs' lease, were, to insure the property in the Alliance Insurance Office, or in such other office as the original lessors might appoint. The premium for the recovery of which the action was brought was paid in respect of a policy not effected in the Alliance Insurance Office, nor in any insurance office appointed or approved by the original lessors. Therefore it was not such a policy as the covenant required.

If it was not, the position of the defendants is per-

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fectly plain. But the defendants say that the conduct of the plaintiffs was such, in regard to their mode of using the property demised, that the defendant Pratt was driven to the course which he adopted, and that he did an act which was as beneficial to the plaintiffs as to himself in effecting the policy as he did. The conduct attributed to the plaintiffs is, that they used the property for a highly dangerous purpose, which made the hazard of fire so great that the Alliance Office would not undertake so high a risk; that the defendant Pratt could not get any other office than one called the State Office to accept the insurance, and that he could not get even them to accept it on any lower terms than the advance of a sum of 528*l.*, which he actually paid to this company for the insurance of this property. And this, the defendant Pratt alleges, was a course to which he was driven by the plaintiffs having used the property for a highly hazardous purpose. It seems to me that if, at the time of this insurance, the property was in the course of being used for the hazardous purpose in question, even then great difficulties would have occurred through the course of conduct pursued by the defendant Pratt. But it is a fact, clearly proved by the defendant's own evidence, that at the particular time when the policy was effected the property was not being used for a hazardous purpose, and it is as clearly in evidence that before the policy was effected, at a time when only 5*l.* 5*s.* needed to have been paid by way of deposit in order to effect a policy which would have been in accordance with the covenant, the plaintiffs' solicitor wrote to the defendant Pratt's solicitors on the subject; that before the defendant Pratt completed the policy, the plaintiffs' solicitor told them that the amount of the premium was extravagant; and protested against it, and treated the conduct of the defendant Pratt in proceeding to effect such a policy as

absurd. One is at a loss to know in what way to account for the conduct of the defendant Pratt in insisting upon paying 528*l.* instead of 5*l.* 5*s.* The fact is beyond doubt, that the property was not used for a hazardous purpose at the time of the policy being effected, and the defendant is driven to support the course of conduct pursued by Pratt upon this ground—that, although the property was not at the time used for a hazardous purpose, yet the manager of the plaintiffs' company declined to bind himself that he would not use it afterwards for a hazardous purpose. That the manager should decline to bind himself not to use the property in all future time for a hazardous purpose, is not in the least degree to be wondered at.

I have said, in the course of the argument, that the rational course in that state of things would have been for Pratt to say, "If you will not bind yourselves not to use the property for a hazardous purpose, you must, for your sakes and mine, bind yourselves to give me notice when you are going to do so, that I may have an opportunity of protecting myself and you."

It seems upon the evidence that the conduct of Pratt in effecting this insurance (which was not a performance of his own covenant, for he had not received the sanction of the original lessors to the policy in question) has been so improvident, so extravagant, so wilfully and causelessly extravagant, that, he having incurred this loss, there is no principle of this Court upon which I can hold that he is entitled to recover against the plaintiffs, by virtue of the original lease, this sum which he has so wantonly and unnecessarily paid.

But it is said that, according to the terms of the contract in that part of the lease in which the plaintiffs bind themselves to pay the expense of insurance, the words are large and general, and are words which import an

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obligation upon the plaintiffs to repay any sums which may be paid by the defendant Pratt in respect of insurance whether unnecessarily paid or not; and it is sought to read these words as an absolute covenant, and without reference to other parts of the deed in which insurance is referred to. That is a mode of construction which it is impossible for the Court to adopt. The instrument must be looked at as a whole, and it seems to me entirely contrary to the true construction of the words to say, that this part of it imposes upon the plaintiffs the obligation to pay any sum that Pratt might choose to pay for insurance, although that insurance might be useless with regard to another covenant in the original deed, which prescribes another mode in which insurance must be effected. Upon the whole case, therefore, on the amended bill, the plaintiffs have shown their right to a decree as prayed by the bill. But there is one part in which the defendants have been justified in the contention they have raised; namely, as to the amendment of the bill. It might be a very probable supposition, looking at Pratt's conduct, that nothing but some motive of private interest of his own could have tempted or induced a man to pursue the course of wanton expenditure which appears in this case. But suppositions are not to be made the ground of pleading in this Court. After the matter was before the Court, and whilst other allegations remained in issue, the plaintiffs very properly struck out this allegation, which they could not maintain. But I must nevertheless make them pay the costs of all that part of the suit which was occasioned by that allegation in the original bill. There must be a direction to tax the costs of that part of the suit which was occasioned by the twenty-first paragraph in the bill, including the evidence, and to deduct them from the other costs of the

suit, the remaining costs to be paid by the defendants. Mr. Pratt is also entitled to be repaid the sum of 5*l.* 12*s.* 9*d.* which he has already paid for insurance in the "Alliance." There will be a decree for a perpetual injunction; and the plaintiffs undertaking to pay 5*l.* 12*s.* 9*d.* to the defendant Pratt for the insurance, there will be a declaration that they are only liable to that extent.

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CORDINGLEY *v.* CHEESEBROUGH.

A lot sold by auction, described in the particulars of sale as a mansion-house and pleasure-grounds containing an area of 7683 square feet or thereabouts, contained in fact but 4350 square feet; but one of the conditions being "that the admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way. On a bill by the purchaser seeking specific performance with compensation, the Court decreed specific performance without compensation, and ordered the plaintiff to pay the costs of the suit.

THIS bill was filed by the purchaser of lot 2 at an auction at Bradford, Yorkshire, on the 8th March, 1860, and it prayed—

"1. That the defendant might be decreed specifically to perform his contract, and to convey the premises to the plaintiff in fee on payment by the plaintiff of the purchase-money, less a compensation for the deficiency in quantity—the plaintiff being willing, on such compensation being allowed to him, to perform the contract on his part.

"2. That for the purpose of ascertaining the amount of the said compensation all necessary and proper directions may be given and enquiries made."

Before the sale printed particulars were circulated, in which the second lot was described as follows:—

"Lot 2. All that capital messuage or mansion-house called Westbrook House, situated in Great Horton Road, in the township of Horton, formerly in one dwelling-house, and occupied by Richard Fawcett, Esquire, but afterwards divided into two dwelling-houses, one of which has been for many years occupied by Mr. William Cheesebrough, and the other successively by Mr. Samuel Laycock Tee and Mr. Samuel Bottomley. The former residence has coach-house, stabling, and suitable out-offices attached. The site of the mansion-house and pleasure-grounds (including a moiety of Randall Well Street on the north-west, and of a certain projected new street on the north-east side thereof) contains an area of 7683 square yards or thereabouts.

Annexed to the said particulars were printed conditions

of sale, which, so far as material to be here stated, were as follows:—

"4. That immediately on each sale being declared the purchaser shall pay to the vendor or his solicitors a deposit after the rate of 10*l.* per cent in part of his purchase-money, and sign an agreement for payment of the remainder at the offices of the vendor's solicitors, Messrs. Rawson, George, and Wade, in Bradford, on the 19th day of April next, at eleven o'clock in the forenoon, at which time and place the purchases are to be completed and the several purchasers are then to have actual possession of the premises in hand, but the vendor shall be entitled to a due proportion of the then current rents of the premises, let to tenants up to that time, to be then paid to him by the purchasers, who shall be entitled to all subsequent rents, and the rents of such lots as are held under one tenancy shall be apportioned by Mr. George Belk Smith, of Bradford, land agent, between the respective purchasers thereof, or, in case it shall be necessary, then between such purchasers and the vendor, and all outgoings up to the 19th day of April next, shall be cleared by the vendor." (10) "That in case the purchaser of any lot or his solicitor, shall make any objection to or requisition as to the abstract of title, the title, or the evidence thereof, or the conveyance, or as to compensation or indemnity or otherwise, which the vendor shall be unable or unwilling to remove or comply with, or which shall be unfounded, the vendor shall be at liberty if he think fit by notice in writing to vacate the sale, and thereupon such sale shall be absolutely null and void to all intents and purposes whatsoever, and the purchaser shall be repaid his deposit-money, but without interest or costs, and each contracting party shall be placed in the same situation as if no agreement had ever been made, unless the purchaser shall within fourteen

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days next after the receipt of such notice from the vendor of his intention to annul the sale, agree to accept the title unconditionally, and such right of the vendor to annul the sale as aforesaid shall not be considered as waived or in any manner affected by any negociation as to such objection or requisition, or any attempt or endeavour to obviate such objection or to comply with such requisition. And nothing in this clause contained shall in any way prejudice the right of the vendor to compel the performance of the contract if he be advised that he can, and think fit to do so." (17) "The admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way." (18) "If any error of any other kind be made in the description of the premises, such error shall not invalidate the sale, but a fair compensation, to be settled by Mr. George Belk Smith, shall be given or taken." (20) "If any purchaser shall neglect or fail to comply with these conditions, the vendor shall be at liberty either to compel a specific performance of this contract or to rescind this contract and to retain the deposit. And if it shall be thought fit to resell the premises by public auction or by private contract, as he may please, and if any loss be occasioned by such sale, such loss and all expenses consequent on or attending that sale shall be paid by the defaulter at this sale, the whole thereof to be recovered as and for liquidated damages, but the purchaser shall not be entitled to any allowance for the deposit, or to any benefit which may arise from such second sale, nor shall it be necessary for the vendor previously to tender him a conveyance, and if the property be bought in at any attempted sale, the price at which it shall be bought in shall be the price by which the loss on such resale shall be determined. The vendor or purchaser shall on demand of either party within fifteen days from the date hereof enter into and execute

articles of agreement, properly stamped, pursuant to these conditions, to be prepared by the vendor and paid for by the purchaser, or the vendor may at his own election procure these conditions to be stamped at any time hereafter at the expense of the purchaser."

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The bill alleged, that the plaintiff attended the sale in person, and was declared the purchaser of lot 2 at the sum of 1650*l.*, and on the same day signed a memorandum, by which he was declared the purchaser at that price, "subject to the terms and conditions above named" on his part to be observed, which he thereby promised to perform, the vendor thereby engaging to perform the same on his part.

The bill (as amended) alleged that the deposit was not in fact paid at the time of signing the contract, but on the 10th March the plaintiff, who in the mean time had visited the property and felt some doubt as to its extent, called on J. H. Wade, the defendant's agent, and on his express assurance that the measurement was correct, of which the plaintiff had expressed some doubts, paid him the deposit of £50. The bill alleged, that when the plaintiff bid for lot 2, and when he signed the contract he had no reason to doubt, and in fact believed, that the quantities stated in the particulars were correct, as they were stated to be both by the auctioneer and the plaintiff's and defendant's surveyor, and the plaintiff fixed in his own mind the price he was willing to give by reference to the quantity of land. The bill alleged that at that time he was not aware of the boundaries of the property, but when they were afterwards pointed out to him by the vendor's surveyor, the plaintiff at once stated that if such were the boundaries, he was sure it did not contain anything like the number of yards alleged. The surveyor replied, that the plaintiff might rest assured that the lot would be found to contain the quantity of land stated, viz., 7683 yards.

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The plaintiff, not being satisfied with this assurance, caused the contents of lot 2 to be calculated by his surveyor, who reported it contained only 4350 square yards. An actual admeasurement of it was made in June, 1860, when the deficiency was ascertained to be 3257, from which the defendant contended about 65 yards should be deducted for a road.

Mr. Taylor, who was the plaintiff's solicitor, informed the defendant's solicitors of the error, but intimated that he should adhere to his contract and claim compensation. The defendant's solicitors replied on the 14th April, referring to the seventeenth condition, as negativing the right to compensation, and adding that, if that condition should not apply, the vendor would not consent to give compensation, and elected, under the tenth condition, to vacate the sale. Mr. Taylor, on the 16th April, wrote to say that the purchaser was unwilling to give up the benefit of his purchase, and denying the vendor's right to vacate the sale. The letter went on to say that Mr. Taylor had advised the plaintiff to abide by the opinion of counsel to be taken at the vendor's expense on a joint case. The vendor's solicitors, in reply, on the 19th April, 1860, wrote to say they had no objection to a reference to counsel as proposed, "and," they added, "we will either divide the costs or leave it with the counsel to whom this question may be referred to say who shall pay the costs." Mr. Taylor wrote again on the 24th April, as follows:—"In reply to yours of the 19th, I have to say that my client agrees to leave the question to counsel, as to whether he shall take his purchase with or without compensation; and, as you suggest, the costs may also be left to counsel."

Previously to this, on the 5th April, possession of one of the two houses standing on the land was given to the plaintiff. Possession of the other was given to him on the 13th May.

In conformity with the above suggestion, a case was prepared and laid before Mr. Dart, who was of opinion that the seventeenth condition was applicable so far, that it clearly precluded the purchaser from insisting upon specific performance with a compensation for the deficiency in the quantity; but his opinion was, that the vendor would not himself have been able to enforce specific performance without allowing compensation. He also thought that the purchaser, by insisting on specific performance with compensation, was making a requisition which was unfounded within the meaning of the tenth condition, and that the vendor was entitled to rescind the contract. As to costs, he thought that, although it seemed rather hard to make the purchaser pay costs, when the difficulty had been occasioned by the mistake of the vendor, yet the purchaser ought to do so in this case, on the ground that the offer made by the vendor would have given him all and more than he was entitled to. The reference must be considered in the nature of a suit, and the liability to costs depended on the answer to the question, "What occasioned the suit?" If a party, having committed an unintentional error, offered to the aggrieved party all he was entitled to, and this was refused, the refusal, and not the original error, was the cause of the subsequent litigation.

After this opinion (which was dated the 4th July, 1860) was taken, some correspondence followed, and on the 7th August Messrs. Taylor and Jeffery wrote to say they understood they were not to act further in the business. On the 8th defendant's solicitors wrote saying they thought they had great cause of complaint—that they had offered either to annul the sale or to complete the purchase; that the plaintiff did not seem willing to adopt either one course or the other without compulsion; they alleged that the time for completion was past, and threatened proceedings.

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Mr. Taylor, who had ceased to be the plaintiffs solicitor, produced this letter, and the plaintiff's solicitors, Messrs. Wells and Co., on the 17th August, wrote to say that Mr. Cordingley declined to act on the opinion of Mr. Dart, and that he was not only ready but desirous to complete the purchase without any further delay on having a proper compensation made.

Some further correspondence passed, the defendant threatened an ejectment, and ultimately the bill was filed on the 7th January, 1861. The plaintiff alleged that he never did nor intended to accede to the proposal to be bound by an extra-judicial opinion.

The defendants, by their answer, submitted as a matter of fact that plaintiff took possession of the premises after he had received notice to vacate; also, that the decision of the referee was accepted by Mr. Taylor as binding on the plaintiff, and was so binding; and, principally, that they were authorised by the tenth condition to vacate the sale, giving the plaintiff at the same time an opportunity of electing to submit to the seventeenth condition and take the premises unconditionally, which opportunity the plaintiff had not thought fit to accept.

Argument.

Mr. *Bacon* and Mr. *Wickens*, for the plaintiff.

This was not a case in which the defendant could deprive the plaintiff of the benefit of his contract by annulling the sale. There was no difficulty in the way of completing the contract; the only question was, the compensation that the plaintiff was entitled to for the insufficient quantity of land the defendant was able to convey.

There could be no doubt about the meaning of the language. When the lot was described as containing by admeasurement a certain quantity, it could only mean that it had been measured. Johnson, in Todd's edition,

in the second meaning, defined the meaning of the word admeasurement to be, the act or practice of measuring by rule. But, even if no such words had been used, it was clear a purchaser would be entitled to compensation for a deficiency, though the sale did not take place professedly by measurement, (*a*) and, moreover, in this case the misdescription amounted to misrepresentation.

But it was said that the 17th condition applies to the error in the misdescription of the particulars of sale, but in *Portman* v. *Mill* (*b*) it was held that a stipulation that the premises should be taken at "349 acres, or thereabouts, be the same more or less," would not cover a deficiency of 100 acres.

In the case of *King* v. *Wilson* (*c*) "a tenant in possession purchased the property, which was represented to be forty-six feet in depth, but was only thirty-three, but the purchaser was held entitled to an abatement." In that case the Master of the Rolls expressed himself thus (*d*):—"The purchaser had it stated to him that the property was forty-six feet in depth, and the abstract of title describes the premises as thirty-three feet. That was objected to immediately. It is said you have described it as forty-six feet, when in point of fact there are only thirty-three. What was the answer made by the solicitor of the vendor? In substance it was this:—Recently there had been an admeasurement, and by the admeasurement it appears there are forty-six feet. Was the defendant, then, to blame in not going to ascertain and measure it? I cannot say he was. The representation was in perfect conformity with the particulars, and I see no reason at all why he was to test the reiterated representation by an actual admeasurement. Further, I see no reason for

(*a*) Dart V. & P. 3rd ed., 426.
(*b*) 2 Russ. 570.
(*c*) 6 Beav. 124.
(*d*) 6 Beav. 129.

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thinking that the purchaser might not have formed his plans as to the property with reference to the notice that there were forty-six feet in depth."

Argument.

Lord St. Leonards, (*a*) referring to the case of *Gell* v. *Watson*, said, "that where the particular quantities of each close are stated with reference to a plan, a further statement of them containing 101a. 3r. 29p. will not preclude the purchaser's right to an abatement, where the quantity of each close is not correct." (*b*) On the whole case it was submitted that the purchaser was entitled to specific performance with abatement.

Mr. *Malins* and Mr. *Everitt* appeared for the defendant, but were not called on.

Judgment.

THE VICE-CHANCELLOR:—

The plaintiff claims compensation, and the claim seems to me to be unsustainable. There is the remarkable circumstance in the case of an extraordinary deficiency in quantity. The quantity stated in the particulars of sale is an area of 7683 square yards, or thereabouts. It turns out that there are only 4350 square yards; that is, not much more than half of the amount described in the particulars of sale. If there were nothing in the contract particularly applying to this matter the right to compensation would be clear. But the contract contains a stipulation which seems to me as clear in its construction and as binding in its effect as can well be framed. The contract states that "the admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way." That is so clearly expressed that it makes it impossible for the purchaser to say, when the error which

(*a*) V. & P., 13th ed. 270.

(*b*) See Winch v. Winchester, 1 Ves. & B. 375.

it was supposed might have taken place is discovered, that he is entitled to any compensation. The argument, however, is, that this stipulation, applied to the facts of this case, imports a misrepresentation, and it is said that the word "admeasurement," as here used, imports that there had, for the purpose of this sale, been actual admeasurement of this piece of ground, as measured by itself. I am unable to follow the view which is thus taken, because it is said that, if an admeasurement of that kind had taken place, then there would have been an ascertainment with accuracy and certainty of what the quantity was. But, if that were so, what was the use of providing for an error? If an actual admeasurement would have made the thing a matter of certainty, what is the use of stipulating as to the possibility of an error? Now, the word "presumed" is one of great force. "The admeasurements are *presumed* to be correct;" that is to say, the vendor declares that this statement of the quantity is not a certainty but merely a presumption. He presumes that what he states is correct; but, if he be wrong, he warns the purchaser that it is to make no difference. There would be no need of the word "presumed" if the word "admeasurement" is to be read in the sense for which the plaintiff contends. Looking at the particulars of sale, the statement of quantity, and this stipulation, I cannot attach to it any rational meaning other than this—that the word "admeasurement" means, "If the quantity which we have stated, of so many acres, which we presume to be correct, should be found to be mistaken, neither party is to have any claim." Suppose it had turned out that the mistake had been in understating instead of overstating the quantity. I asked the counsel for the plaintiff what they would have said if, instead of what is called 7000 square yards being 4000 in quantity, it had turned

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out there had been 10,000, what would have been their position then? Why, it is perfectly plain that the vendor sold this particular plot of ground with this description—that, if his presumption that it contained 7000 turned out to be wrong and it contained 10,000, he could have had no remedy whatever, and the purchaser would have been entitled to hold him to the contract. The essence of the description is, that what is stated is stated presumptively; and the stipulation is, that if that presumption turns out to be erroneous neither party is to claim compensation. The frame of the suit excludes the right to rescind the contract, for, as my opinion is that the plaintiff is not entitled to a compensation on the construction of the contract as contained in these conditions of sale, it is needless to go into the other questions; the bill is for specific performance, and therefore it is not competent for this plaintiff to say he will elect to give up the contract unless the defendant will give compensation Therefore, in my view, the plaintiff must have a decree for specific performance, without payment of any compensation, and on payment of the full price. With reference to the costs, on reading the answer, particularly as to the reference to counsel and the change of solicitors, it appears that the conduct of the plaintiff has been unreasonable. The defendant is therefore entitled to costs, including those of the reference.

Declare that, upon the construction of the contract, the plaintiff is not entitled to compensation in respect of the mistake as to quantity; decree specific performance of the contract; order payment by the plaintiff to the defendant of the purchase-money and interest, the amount to be verified by affidavit; order conveyance by the defendant on such payment, with reference to chambers to settle the conveyance if the parties differ; the costs to be taxed and paid by the plaintiff to the defendant.

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BULLOCK *v.* CROCKETT.

February 27.

THE plaintiff, J. B. Bullock, an attorney and solicitor, carrying on business at 51, Lincolns Inn Fields, entered into an agreement with the defendant, who was then a managing clerk of a firm of solicitors in London, to take him into partnership.

By an indenture dated the 29th December, 1852, between the plaintiff Bullock of the one part, and the defendant Crockett of the other part, it was agreed among other things that the defendant should pay to the plaintiff 600*l.* by way of premium in the manner thereinafter mentioned. The deed witnessed that in pursuance of the agreement, and in consideration of 350*l.* paid by the defendant to the plaintiff as part of the said premium, and in consideration of the covenant thereinafter contained for payment of the remainder of the premium on the 25th of March then next, certain articles were entered into and agreed upon between the parties. The articles provided that the plaintiff and defendant should continue in partnership as attorneys, solicitors and conveyancers for fourteen years from the 1st January, 1853. The capital of the partnership was to consist of 500*l.* and such other sum and sums of money as should from time to time be wanted for carrying on the business, to be contributed by the partners in equal moieties. By the 10th article it was provided that each of the partners should be at liberty to draw out sums not exceeding 75*l.* a quarter for his own use, such sums to be duly accounted for. In case at the end of any year during the first three years of the term it should appear, upon taking the general annual account, that the net gains and

Where on the dissolution of a partnership one of the partners is entitled to a return of a proportion of the premium on the ground of failure of the consideration, the Court in determining the proportion will not always fix it by reference exclusively to the whole period for which it was agreed that the partnership should last, but will have regard to the conduct of the partners and the amount of benefit already obtained.

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profits of such year actually received or arising from good debts for business transacted in such year, should not have amounted to the sum of 600*l.*, then and in such case, immediately after such general account or rest should have been made or settled, the plaintiff Bullock alone agreed to repay to the partnership the whole difference or deficiency between the said annual sum of 600*l.* (being the calculated average yearly profits or income of the said partnership) and the sum which the net gains and profits actually received or arising from good debts for business transacted in such year should have amounted to; it being the distinct intention and agreement of the said parties thereto that the plaintiff Bullock should, and he in particular thereby expressly covenanted and agreed to secure and guarantee to the defendant Crockett, during the first three years of the said term, the clear annual income and receipt of 300*l.* free of all deduction except the annual certificate, and income and property tax. The 14th article provided that each of them the said J. B. Bullock and G. L. Crockett would, at all times during the continuance of the partnership, diligently and faithfully employ themselves in and about the affairs of the partnership, and carry on the business for the greatest benefit and advantage of the partnership, subject to the following qualification, namely, that the plaintiff Bullock should not be bound to take as active a part in the said business as the defendant G. L. Crockett. The indenture contained a proviso that if, contrary to the several contract and agreements therein contained, either of the said partners should "neglect or refuse to attend to the business of the partnership in manner aforesaid," or do any of a variety of acts therein specified, then and in any of the said cases the other of the said partners, if he should think fit, should be at liberty to dissolve the said partnership by giving to the partner who should offend in any of the

particulars aforesaid a notice in writing declaring the said partnership to be dissolved and determined; and the said partnership should, from the time of giving such notice, or from any other time to be therein specified for the purpose, absolutely cease and determine; and the partner so giving notice of dissolution was at full liberty, and was thereby authorized, to advertise the same in the *London Gazette* without the consent of the other.

The partnership was carried on until the 30th September, 1859, the defendant having paid the two sums agreed on, viz:—250*l.* and 350*l.*

In October 1858, it was agreed that a managing clerk should be engaged by the firm, and a memorandum was made, which was to the following effect:—

"It is understood between us that an additional clerk, as a thorough managing clerk, at a salary of 100*l.*, shall be engaged forthwith, instead of my attendance, pending any other arrangement consequent on my own inability to attend to business on account of my health. Further arrangements to be forthwith considered and made. Dated 28th October, 1858."

The partnership continued to be carried on, but not very cordially. The bill alleged that on the 30th September, 1859, the plaintiff went to the office of the firm in order to transact whatever business might be going on, when one of the clerks brought him the following letter from the defendant.

"51, Lincolns Inn Fields, 29th September, 1859.

"Joseph B. Bullock, Esq., Berkhampstead, Herts.

"Dear Sir,—Your continued and entire absence from the office, and consequent neglect and breach of our partnership articles during the past twelve months and

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upwards (and, with trifling exceptions, during a great part of the previous year also), has been for a long time a subject of great regret and anxiety to me on your account, as well as my own, and has at length forced upon me the conclusion that it is far better for us both that a partnership the discharge of whose duties is so entirely one-sided can no longer be maintained with credit to either of us, to say nothing of the heavy responsibility and positive disadvantage and loss this state of things has involved me in. I cannot but think, in the circumstances, that a dissolution of the partnership will be a relief to yourself; and after the close unremitting attention with which I have alone carried on the business during the above period for your equal advantage, it cannot be said that, in at length taking this step, I have done so hastily, or with any unfriendly feeling. . . . I have, therefore, to give you notice, and I do hereby give you notice (pursuant to the 23rd clause of our partnership articles), that I declare the co-partnership existing between us, under the indenture of the 29th December, 1852, dissolved and determined as from the 29th day of September, 1859, and that I shall insert a notice of dissolution thereof in the *London Gazette*, as, by such clause, I am empowered to do. I purpose winding up the affairs of the partnership forthwith, in due course. . . . I hardly need say, I shall wind up the affairs with all faithfulness, and subject to all liabilities being discharged. Your moiety of profit shall be shown in the account I shall render, and shall be handed over to you, of course without prejudice to my claim to have returned to me the proper proportion of the premium I paid you for the business, which will be considerably above a moiety, as you will see from the case *Astle* v. *Wright*, 23 Beav. 77.

Again regretting the necessity for this step, and with best wishes for your welfare,

I am, my dear sir, yours faithfully,

(Signed) G. L. CROCKETT."

Statement.

The bill prayed that, if necessary, it might be declared that the partnership was dissolved by the defendant's notice of the 29th September, 1859, as from that day, and for the usual accounts, &c.

The only question between the parties was as to the right of the defendant to have a proportionate part of the premium returned. The defendant, by his answer, claimed to have the 600*l.* apportioned over the whole of the term of the years for which the partnership was to have continued, and submitted that so much of the said sum of 600*l.* as was attributable to the period between the 1st January 1853, and the 29th September, 1859, should be retained by the plaintiff, and the residue returned to him, the defendant.

It was alleged by the answer that the plaintiff was for long periods absent from business; that he never attended the office from Christmas 1858 (with the exception of the first five or six days in January 1859, when he attended for an hour or an hour and a half) until the 14th March, 1859. The plaintiff alleged the bad state of his health as the reason for his non-attendance. It appeared that the plaintiff when the partnership commenced had a lease of the office where the business was carried on; that such lease had lately expired, and that the defendant had thereupon obtained a lease of it, and now carried on business there. The plaintiff also now carried on business a few doors off.

Argument.

Mr. *Greene* and Mr. *Bevir* for the plaintiff.

The only question is as to the return of the pre-

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mium. The plaintiff admitted the defendant into partnership, and thereby gave him the benefit of his connection and introduction. The defendant was in exchange for these advantages to pay 600*l.*, and to take the active part of the business. On what ground therefore was the defendant, who had received all that the plaintiff stipulated to give, to get back the premium? In the case of *Astle* v. *Wright* (*a*) there was gross misconduct, which was not even pretended in this case. In *Freeland* v. *Stansfeld* (*b*) there was misrepresentation amounting to fraud: here there was nothing of the kind. That the partnership did not last the full term was the act of the defendant. [*Lee* v. *Page* (*c*) was also cited.]

Mr. *Bacon* and Mr. *W. W. Cooper* appeared for the defendant, but were not called on by the Court.

Judgment.

THE VICE-CHANCELLOR:—

The principle being established, that if there be a failure of consideration there is an equitable right to a return of a portion of the premium, the only question is, what are the circumstances under which the consideration has failed? If it has failed through the fault or caprice of the defendant, his case must fail. If, on the other hand, it failed through the negligence of the plaintiff, it is difficult to say that the defendant is not entitled to some part of the premium. But the difficulty of this case is, that the principle of the extension of the premium over the whole term of the partnership cannot be applied. The defendant paid his 600*l.* on the bargain that during the first three years his share of the profits should be not less than 300*l.*; and thus he has already had a most im-

(*a*) 23 Beav. 77. (*b*) 2 S. & Giff. 479. (*c*) 30 L. J. 857.

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portant part of the consideration, which cannot be referred to the whole term of years during which the parnership was to last. He has been introduced into a connection, and he retains as much of it as he can. All these circumstances must be taken into consideration; and as it must be a matter of estimate, I think that justice will be met if the defendant receives back 100*l.* from the premium. If that suggestion be agreed to, there will be a direction to take the accounts of the partnership, and in taking the account to give the defendant credit for 100*l.* in consideration of the loss he has sustained from the dissolution. As to the plaintiff's argument that the defendant is entitled to no return of the premium at all, because he voluntarily dissolved the partnership, and voluntarily deprived himself of the benefit of the partnership, no doubt it deserves some attention, but, looking at the whole case, I think it cannot be said that the defendant is not entitled to the sum of 100*l.* No costs on either side up to the hearing. The plaintiff takes the account at his own peril.

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March 11.

THE ATTORNEY-GENERAL *v.* CHRIST CHURCH, OXFORD.

Where it was necessary to grant a large number of building leases of charity lands in nearly the same form under the provisions of an Act of Parliament, and one lease had been settled in chambers, the Court allowed the charity to grant other building leases from time to time in the same form, without reference to chambers, the model lease being appended to the order.

THIS was a petition by the Rev. Jacob Ley and the Dean and Chapter of Christ Church, Oxford, and it prayed that the petitioners might be at liberty from time to time to execute building leases of parts of the premises pursuant to the provisions of the 10th day of June, 1859, and in accordance with the leases already settled and approved by the Court, without the settlement or approval of such future leases by the judge to whose Court this cause was attached, and notwithstanding the direction to that effect in the said order of the 25th day of July, 1859, and that the costs might be taxed, &c.

The petition stated that by a decree made in the information dated the 19th February, 1851, it was ordered that it should be referred to the Master to inquire and state what estates were devised by the will of Dr. South to the Dean and Chapter and their successors, and what was the rental thereof, and also whether it would be fit and proper that any, and what, steps by application to Parliament or otherwise should be taken by the petitioners for obtaining a power of granting any, and what, building or other leases of the said estates, and any, or what, part thereof.

By an order made on the petition, dated the 14th June, 1851, it was decreed that if the Master approved of an application to Parliament for power to grant building leases of the estates devised by the will of Dr. South he should settle an Act for that purpose, and it was also

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ordered that in case the said Act should be obtained he should settle some general scheme for granting building leases of the said estate, or of such parts as should be proper.

That accordingly by an Act of Parliament made and passed in the sessions holden in the 14th and 15th years of the reign of her present Majesty c. 18, intituled "An Act to enable the Dean and Chapter of the Cathedral Church of Christ in Oxford, of the foundation of King Henry the Eighth, and their trustees as owners in fee of lands in Kentish Town, in the county of Middlesex, to grant building leases and for other purposes," it is (amongst other things) enacted that from and after the passing of the said Act it should be lawful for the trustees or trustee for the time being holding the said lands and hereditaments, situate at Kentish Town aforesaid, in trust for your petitioners, the said Dean and Chapter, by indenture to be executed by them, and to be registered as therein mentioned from time to time by the direction of your petitioners, the said Dean and Chapter, evidenced as therein also mentioned, and with the licence of the Lord of the said Manor of Cantlows for the time being, so long as the said lands should remain of copyhold tenure, according to a scheme to be for that purpose settled by the Master for the time being to whom the said cause should stand referred, to lease all or any part or parts of the said lands with the appurtenances for any term of years not exceeding ninety-nine, to take effect in possession to any person or persons whomsoever who shall be willing to erect any dwelling-houses or other buildings on the lands in any such lease to be comprised or any part thereof, and with all or any of the several liberties, easements, or privileges therein mentioned or referred to, so as in every such lease there be reserved and made payable half-yearly or oftener

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during the continuance of the term thereby granted, and to be incident to the reversion immediately expectant on the determination thereof, the best yearly rent which at the time of making such lease could be reasonably obtained for the same, considering the nature of the lease and having due regard to the expenditure of the lessee in buildings, repairs, or improvements, and his responsibility and other the circumstances of the case, and so as there be contained in every such lease the several covenants on the part of the lessee therein specified, with other provisions and stipulations usual in leases of a like nature; and it was thereby further enacted that it should be lawful for your petitioners, the said Dean and Chapter, by themselves or by their trustees, or by any other person or persons acting on their behalf, and according to such scheme to be settled as aforesaid, to enter into any contract in writing for granting leases of the lands thereinbefore authorized to be leased as aforesaid, or any part or parts thereof, pursuant to the powers and subject to the restrictions therein contained so far as the same should be applicable; and by such contract to agree when as any land thereby agreed to be let or any part or parts thereof should be built upon in the manner, and to the extent to be stipulated in such contract by one or more indenture or indentures, to lease or cause to be leased the same lands or any part thereof to the person or persons contracting to take the same as aforesaid, or his executors, administrators, or assigns, or to his or their nominee or nominees for and during the remainder of the term to be specified in such contract, and in such parcels and under and subject to such portions of the yearly rent to be specified in such contract as should be thought proper, with all such further agreements and stipulations as therein mentioned or generally authorized.

That under the powers of the Act an agreement

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for a building lease was entered into on the 3rd March, 1858, between Mr. Taylor, of 21, Lincolns Inn Fields, and the Dean and Chapter, which by a decree dated the 10th March, 1858, was ordered to be carried into effect.

That on the 10th of June, 1859, another similar agreement was made and entered into between the same parties for granting building leases of certain other parts of the said charity estate. And the said last mentioned agreement contained the following (among other) provisions and stipulations, (that is to say):— Your petitioners the said Dean and Chapter did thereby agree to grant by deed or deeds such lease or leases as thereinbefore mentioned (but subject to the sanction of this Honourable Court being obtained to the said agreement), and the said John Temple Taylor did agree to take such lease or leases of a portion of the thereinbefore mentioned land containing nineteen acres or thereabouts, and which portion of land was distinguished on the plan annexed to the said agreement, and identified by the signatures of the said John Temple Taylor and Dr. Jacobson, the treasurer of your petitioners the said Dean and Chapter, on the following terms and conditions:— The term to be ninety years, computed from Midsummer day, 1859, and to be for the 1st, 2nd, 3rd, 4th, and 5th years at 100*l.* per annum, and the 6th and remaining years of the term at 700*l.* per annum payable quarterly, and the first quarterly payment of the said rent of 100*l.* to be made on Michaelmas day, 1859, and the first quarterly payments of the rent of 700*l.* to be made on Michaelmas day, 1864, the lessee to pay all tithes, taxes, and rates of every description. To insure all buildings as erected in three-fourth of their full value in one of the public insurance offices to be approved by the lessors or their survivors. All plans and elevations of the several

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buildings to be submitted to and approved by the surveyor to the estate; the roads shown on the said plan were to be formed and the sewers built at the cost of the lessee, according to such plans, sections, and levels as should be approved by the Metropolitan Board of Works and by the said surveyor. And the several streets, roads therein mentioned were to be made and completed on or before the several terms therein specified. The lessee was to erect on the said ground 200 houses as shown in the said plan, and every house should cover not less than 400 superficial feet, and was to be erected according to the plans and elevations to be approved of in writing by the surveyor of your petitioners the said Dean and Chapter, and the timber and other materials were to be of such kind, and the timber of such strength and dimensions as should be approved of in like manner by him. The houses were to be erected during the following periods, viz.:—Fifteen houses during the first and second years of the term. Fifteen houses during the third years of the term, and the same number in each of the fourth and fifth years of the term. The remainder of the said 200 houses within ten years then next following, and the lessee or his nominee was to have a separate lease or any leases for one or more of the houses as he might require, at such portions of the above-mentioned rent as the lessors should think fit, but no lease was to be granted until the said surveyor should have given a certificate to the effect that the house or houses comprised therein was or were erected and covered in. The ground-rent reserved by a separate lease was not to exceed one-fifth part of the yearly value of the house or houses comprised therein when erected and finished, and to be apportioned by the said surveyor, so that the apportioned rent should not be less than five shillings upon any one house. The lessee might, if he so required

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it, after having taken up leases to the amount of 35*l.* on one acre of the said ground, have a lease or leases of houses, when erected to the satisfaction of the said surveyor, on the remaining portion of such acre, at a ground-rent or ground-rents not exceeding in the whole the rent of 5*l.*, but in no case should the lessee secure a rental on any one of such houses of less than five shillings per house, as before situate, and so for every remaining acre, but that the whole amount of rental reserved should amount to but should not exceed the sum of 700*l.* as therein stated. That a draft lease should be signed at the time of signing the said agreement, and all leases in future should be in form (or as near as might be to meet the case) of the draft lease signed therewith. And it was thereby agreed and declared, that until such lease or leases as therein mentioned, should be actually executed of all the said land, the rents, covenants, and conditions thereby agreed to be thereby respectively reserved and contained, and as were contained in the before mentioned draft lease, should, as nearly as circumstances would permit, with respect to such part or parts of the said lands as should not for the time being have been comprised in any lease or leases granted by virtue of the said agreement be paid, observed, and performed as if the lease or leases thereof had been actually executed. And the said agreement also reserved to the lessors the usual powers of distress and re-entry in case of default in payment of any of the rent or rents thereinbefore reserved, or in building or finishing the houses within the prescribed period, or other non-compliance with the restrictions or stipulations thereinbefore contained.

In pursuance of the above agreement, a model lease was prepared and executed, and subsequently numerous other leases executed by the Dean and Chapter to different parties.

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The petitioner alleged that all the said leases were in fact identical, with the exception only of the apportioned ground-rent, and the description, and the necessary variation consequent on some of the leases containing different numbers of houses.

That the petitioners were advised and believed, that in consequence of the identity or similarity of the leases, settlement or approval of the Judge in Chambers was unnecessary, and would if required occasion great unnecessary expense and delay.

That the said John Taylor (one of the lessees) claims to have a lease of such house as soon as covered in, and if any delay in granting such lease were occasioned, the builders could not grant under-leases, and would be thereby precluded from borrowing money to complete such houses, and would decline to enter into contracts for building on the said charity lands, whereby the said Taylor would be unable to perform his agreement, and and the said charity lands would be greatly depreciated in value.

That though only 200 houses were specified in the said agreement 313 were in fact to be built thereon, as set out in the plan, of which 296 remained to be leased when built and completed in respect of which it might be necessary to make 200 applications to the Court, the expense of which would be on an average from 12*l.* to 14*l.*

Argument.

Mr. *Jones Bateman* appeared for the petitioners, and asked for an order in the form of the prayer of the petitioner. He cited the cases of *Weeding* v. *Weeding* (*a*), *Re Hemmingway* (*b*), *The Earl of Jersey's Settled Estates* (*c*).

(*a*) 1 J. & H. 230.
(*b*) V.C. Wood, Feb. 2, 1859.
(*c*) V.C. Kindersley, 6th and 8th May, 1861.

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Judgment.

Mr. *Wickens*, for the Attorney-General, supported the application.

The VICE CHANCELLOR made the order as prayed, and it was directed that the model lease should be annexed in a schedule to the order.

THE ANGLO-AUSTRALIAN LIFE ASSURANCE COMPANY *v.* THE BRITISH PROVIDENT LIFE AND FIRE SOCIETY.

January 15, 16, 17 & 18.

THE OFFICIAL MANAGER OF THE BRITISH PROVIDENT SOCIETY *v.* THE ANGLO-AUSTRALIAN LIFE ASSURANCE SOCIETY.

Where one Insurance Company, A., transferred all its business, property, effects, and liabilities to another company, B., on the terms of A. shareholders being indemnified, on a bill by A. for specific performance of the agreement, the Court decreed such indemnity, and the other company, which was ordered to be wound up, having by its official manager filed a cross bill, alleging fraud and misrepresentation, and that such agreement was *ultra vires*, the second company, B., having had the benefit of the agreement, was held not to be entitled to object that the agreement was *ultra vires* and improperly entered into by the managing body, and the cross bill was dismissed.

THE plaintiffs were a Life and Annuity Assurance Company, incorporated under the 7 and 8 Vict. c. 110. In 1853, the defendants were incorporated under the same act as a Life, Fire and Annuity Society. The original bill in this case was filed by the Anglo-Australian Company, for the specific performance of an agreement entered into between the plaintiff and the British

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Provident Life and Fire Assurance Society. By an indenture dated the 1st June 1858, made between and duly executed by John Jones and Richard Griffiths, two of the directors of the British Provident Society, of the first part, and Griffith Taylor and Tobiah Pepper, two of the directors of the Anglo-Australian Company, of the second part, to which the common seals of the two companies were duly affixed—after reciting the incorporation of the two companies, and also that, in pursuance respectively of the powers given to the proprietors and policyholders in general meeting assembled, under the provisions of the deeds of settlement of the two companies, "for the union and amalgamation thereof with any other assurance society or assurance company," it was agreed on Monday, the 19th April then instant, by and between the boards of directors of the two companies, assisted by a committee of shareholders and policyholders appointed at a meeting of the Anglo-Australian Company on the 15th February then last, that, subject to the confirmation and ratification of general meetings of the two companies, "an amalgamation and union" of the said British Provident Society and Anglo-Australian Company should be effected as and from the 19th day of April then instant; also, that extraordinary meetings of the two companies had been respectively held on the 28th April then last, and on the 7th and 8th May then instant, whereat the amalgamation and union aforesaid was in the terms and conditions of the said presents duly ratified and confirmed—

The said deed then witnessed that, in furtherance of the resolutions of such extraordinary meetings as aforesaid, the parties thereto of the first and second parts, and each of them did thereby for and on behalf of the said British Provident Society and Anglo-Australian Company, mutually covenant and agree with the other and others of them that, as and from the 19th of April then instant,

the said Anglo-Australian Company and the business connections, agencies, and branches thereof, should be transferred to and united and amalgamated with the said British Provident Society upon the following terms:— First, the business and property, effects, liabilities and engagements of the Anglo-Australian Company as fully set out and particularised in the schedules thereunto annexed, including also all the risks and engagements of the life assurance and endowment policies, and also the policies or grants of annuities issued by them, and then in force of the said Anglo-Australian Company, should be and were thereby absolutely transferred to, and were and should be undertaken by, the said British Provident Society, &c.; provided always, that the premiums or contributions for the renewal of the said policies, &c., if any, thereafter to become due should be paid and payable only to the said British Provident Society. Second, that the shareholders in the British Provident Society and Anglo-Australian Company, on the completion of the aforesaid amalgamation and union in respect of the payments on their shares in the capital of the British Provident Society, should be put on the same and on equal footing, and that the shareholders respectively of the said British Provident Society and Anglo-Australian Company should thereupon respectively make up their calls in payments to the amount of 2*l.* per share. Third, that the shareholders of the Anglo-Australian Company should become shareholders in the British Provident Society, and should execute the deed of settlement of the said company, for the same or an equivalent number or amount of shares as were then held by them in the Anglo-Australian Company, and thereupon the calls already paid by them should be passed to their credit: "and thereupon the said shareholders should, out of the funds and property of the said British Provident Society, be absolutely held harmless and indemnified against all

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and any liabilities in respect of the said Anglo-Australian Company by reason of their execution of the deed of settlement." Provided always, that the execution of the deed of settlement of the British Provident Society by the shareholders of the Anglo-Australian Company should be completed on or before the 24th of June then next, and that such of the shareholders respectively as should fail to execute as aforesaid should be precluded from the benefits of such union and amalgamation, "but should not, by reason of the neglect or failure . . . [In the deed, as printed in the bill, certain words were omitted.] as shareholders from his, her, or their present liabilities to or on account of the said Anglo-Australian Company." Fourth, the name of the Anglo-Australian Company to be retained. Fifth, upon the execution of the indenture, all the assets, property, and effects of the Anglo-Australian Company, including lease of chief office, should be absolutely made over, transferred, and assigned to three trustees, specially appointed by the board of directors for and on behalf of the British Provident Society. . . . Tenth, that the statement of the business accounts and affairs, and of the assets and liabilities of the British Provident Society and Anglo-Australian Company respectively, should, for all the purposes of the amalgamation and union, as severally shown by the books of the companies then kept at the respective offices, be taken to be truly and fairly made, and no error, omission, or discrepancy whatever which might be thereafter discovered should prejudice or invalidate the union and amalgamation therein agreed to be effected between the two companies. The deed contains three schedules. Schedule 1 containing assets and liabilities of the Anglo-Australian Company up to 19th of April, 1858; schedule 2, policies and annuities granted by the same company; schedule 3, assets and liabilities of the British Provident Society up to same day.

By a second indenture, dated the 28th of October,

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1858, reciting the indenture of the 1st of June, all the fixtures and effects in the office of the Anglo-Australian Company, and all monies arising and to arise from the chief office premiums, and from the credit and half-credit premiums due to the company, and the cash deposited with the bankers of the company, and all the right and title of the company thereto, and also the residue of the lease held by the company in the premises No. 5, Cannon Street West, and all the instruments and policies of life assurance effected in the said company, and all other assets, effects, and property whatsoever of the said company, were assigned to John Jones, Richard Griffiths, and James Goad, as trustees for and on behalf of the British Provident Society.

The plaintiffs performed their part of the contract, but, certain proceedings having been instituted against them, they filed their bill on the 11th (amended on the 25th) of June, 1860, alleging that immediately after the date of the deed of the 1st of June, 1858, the defendants took possession of the whole of the monies, property, and effects of the Anglo-Australian Company, and had since received premiums then due on policies which had been granted by the company, and new premiums on policies since issued by the society through the agencies and branches of the company; that the defendants nevertheless had not paid, discharged, or satisfied the debts, liabilities, and engagements of the company, which, by the terms of the said indenture, they were bound to do; that several suits and proceedings at law and equity had been since instituted, and were then pending against the company for debts and liabilities which ought to have been paid and discharged by the society, the defendants, and in which they ought to save harmless and indemnify the plaintiffs; that the society were defending their suits and proceedings in the name of the Anglo-Australian Company; that they had also commenced and instituted actions, suits, and

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other proceedings in which they had used the name of the company; that the society were in embarrassed and insolvent circumstances; that they had paid and applied the monies, properties, and effects of the company in discharge of the debts and liabilities of the society, and threatened to continue to receive the premiums now due and payable in respect of the policies of assurance issued by the company, without discharging the debts and liabilities of the company; and finally, that the defendants had sold and disposed of the whole of the business of the plaintiffs' company, chiefly to the British Nation Life Assurance Association, and partly to the National Assurance Investment Association.

The bill prayed that the defendants might be compelled specifically to perform their contract made with the plaintiffs, contained in the indenture of the 1st of June, 1858, and to pay and discharge the debts, liabilities, and engagements of the plaintiffs mentioned and expressed in the said indenture, and to save harmless and indemnify the said Anglo-Australian Company and shareholders thereof from and against the said debts and liabilities; and if the Court should not think fit to decree specific performance, then that an account might be directed of the assets of which they had possessed themselves under or by virtue of the said deed, including the goodwill of the plaintiffs' business, which had been sold and disposed of by them. The bill further prayed for an account, a receiver, and an injunction.

On the 30th of January, 1860, the defendants put in their answer, whereby they alleged, first, that the plaintiffs had no authority under their deed of settlement to enter into such a contract. Secondly, that the defendants were induced to enter into the contract by fraud and misrepresentation. Thirdly, that the defendants had no power to enter into such a contract, and lastly, that, supposing the contract to be binding, the true construction of it was

that the defendants thereby agreed to indemnify such only of the shareholders of the plaintiffs' company as should come in and execute the deed. They admitted the transfer by deed of the 8th of March, 1859, of their business to the British Nation Life Assurance Company.

On the 20th of February, 1861, the plaintiffs served notice of motion for a decree; but before the cause came on for hearing, Vice-Chancellor Kindersley made an order to wind up the defendants' company, the British Provident Society. On the 10th of May W. Turquand was appointed official manager.

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In June, 1861, the official manager, by leave of Vice-Chancellor Kindersley, filed a cross bill, alleging the same case as in the answer, and praying for a declaration that the execution by the British Provident Society of the deed of the 1st of June, 1858, was invalid, and was obtained by fraud and misrepresentation on the part of the Anglo-Australian Company, and that the same was void, and that the same, and also the indenture of the 28th of October, 1858, might be delivered up to be cancelled; and for other consequential relief.

The plaintiffs in the cross suit alleged that the Anglo-Australian Company had no authority to enter into the contract. By the 17th section of the plaintiffs' deed of settlement, dated the 9th of September, 1853, it was provided that a majority of two-thirds in value of the shareholders present (either personally or by proxy), and of two-thirds in value of the policy-holders present personally at any extraordinary meeting, might make bye-laws and regulations, which should be binding and conclusive on the company, provided the same should have been previously *recommended for adoption by the directors*, and provided also that the same should be confirmed by a subsequent extraordinary meeting. The deed of settlement of the Anglo-Australian Company contained no provision enabling them to amalgamate with or assign

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their business to any other assurance company; but at an extraordinary general meeting held on the 15th of February, 1858, a resolution was made to the effect that the 17th clause of the deed above should be altered by the insertion of the following clause "[and also to resolve upon the purchase of the business of any other company, or upon the taking over of any other company either by way of amalgamation or otherwise, or upon the sale of its own busines, or upon the amalgamation of the company with any other company]," and to apply for an Act of Parliament. The defendants alleged that they had searched the minute-book of the plaintiffs' company, and had thereby discovered that no resolution was ever previously passed by the board of directors recommending the altered clause No. 17 for adoption. They insisted that such previous recommendation was a necessary condition to the validity of the resolution.

At a meeting of the plaintiffs' company, held on the 31st of March, 1858, a report was read and adopted, setting forth an account of liabilities and assets, showing liabilities to the amount of 19,567*l.* 12*s.* 2*d.*, and a deficit of assets to the amount of 11,739*l.* 18*s.* 5*d.* The defendants alleged that this state of plaintiffs' affairs was not disclosed or made known to them, and that in lieu of a proper disclosure it was fraudulently represented by the plaintiffs that their concern was in a flourishing state, and that in the schedule to the indenture of the 1st of June, 1858, the plaintiffs professed to show a balance in their favour of 5023*l.* 19*s.* 10*d.*

Among other grounds of defence it was alleged that William Webster, the owner of 500 shares and about fifty other shareholders in the plaintiffs' company, had never come in under the amalgamation deed; the number of shares held by shareholders who did come in was 1278 only; and of those held by shareholders who did not, was 4712.

Defendants further alleged that, in the schedule to

the deed of the 1st of June, 1858, no mention was made of the claim of one John Woodhams against the plaintiffs (*a*), or of the claim of the executrix of one Henry Horn, deceased. They also alleged gross mistakes and over-statements with regard to the amounts of the various items mentioned in the list of assets as stated in the schedule, and other misrepresentations.

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The defendants further alleged that they had not power to enter into the agreement. By clause 151 of their, the defendants', deed of settlement, dated the 11th of December, 1850, it was provided "that an extraordinary board of directors, specially called for that purpose, may come to a resolution either to sell or transfer the business of the society to any other society or societies, company or companies of a similar nature, or to purchase or accept a transfer from such other society or societies, company or companies as last aforesaid of their respective businesses, and upon such terms, conditions, stipulations, and agreements as the said board shall think fit; and if such resolution shall be adopted and confirmed by a majority of at least three-fourths of the proprietors and members present, either personally or by proxy, to be given in such manner as is hereinbefore in that behalf mentioned, at an extraordinary meeting, specially called for that purpose, but not otherwise, such sale or transfer, as the case may be, shall be effected and take place. The defendants alleged that the attempt of the British Provident Society to amalgamate was wholly unauthorised by the deed, except so far (if at all) as it was authorized by the said clause.

On these grounds the plaintiffs in the cross suit submitted that the agreement was invalid. By their answers to the cross-bill the Anglo-Australian Company said that their original deed contained sufficient provisions enabling

(*a*) See *antè*, p. 238.

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them to amalgamate; that no shareholder in their company had attempted to impeach the validity of the amalgamation; and that the defendants were estopped from impeaching the same by the deeds of the 1st of June, 1858, and the 28th of October, 1858. They further submitted that at a meeting of the board of directors held on the 29th of January, 1858, an alteration of the 17th clause was recommended, and it was resolved that notices of a meeting to consider such proposed alterations should be given; that the only acting directors were present at the meeting of the 15th of February, 1858, at which the alteration was unanimously agreed to. They submitted that the alteration was, in fact, previously recommended for adoption by the directors.

With reference to the alleged fraud and misrepresentation, they said that the account stated in the report adopted on the 31st of March, 1858, was an account as between the directors and the company, and not a statement of liabilities and assets as the same would affect a person undertaking the same. For example, an item, "received for shares 5864*l.*," although properly inserted under the head "liabilities" in an account such as that contained in the report, would not be taken into account in a statement of liabilities to be undertaken as aforesaid; and so of other items. They said that at all events the report containing the account was known to John Sheridan, the managing director of the defendants' company long before the execution of the deed of amalgamation. They denied misrepresentation and suppression.

With regard to the case of Woodhams, they alleged that he was merely the mortgagee of one Lacy, whose debt was included among the liabilities, and that, as to the case of Horn, that was a claim known to be invalid.

It appeared from the evidence that several proceedings had been instituted against the Anglo-Australian Company for claims which the plaintiffs contended ought to have been

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discharged by the British Provident Society. A gentleman named Webster had recovered judgment for 1904*l.* 3*s.* 9*d.*, which was still unsatisfied. One Tobiah Pepper had also brought an action, in which he had recovered 1500*l.*, and for which a verdict had been entered up. The Phœnix Life Assurance Company had commenced an action to recover 500*l.* on a policy. Messrs. R. B. Beddome and J. B. Beddome had commenced an action to recover 21*l.* 18*s.* 10*d.* in respect of bills of costs. One Joseph Redman had commenced an action for 300*l.* on a policy. There were also the suits of Woodhams and Horn's executrix. A suit by one Pocock in respect of twenty-nine annuities, for which the Anglo-Australian had represented themselves in the first schedule as "liable only on the condition of fulfilment of certain agreements entered into by the United Kingdom Mutual Annuity Society;" and another by Harrison, the *cestui que trust* of Joseph Redman aforesaid.

Statement.

Mr. *Malins* and Mr. *Shebbeare*, for the plaintiffs in the original bill, opened the case, but on the evidence being read his Honour called on the counsel for the defendants,

Argument.

Mr. *Bacon* and Mr. *Karslake*, for the British Provident Society.

This was not a case of sale and transfer but one of amalgamation, in which the two companies had been blended, and the shareholders in the Anglo-Australian Company, or at least those who had executed the deed, had become shareholders in the defendants' company. The question therefore was really a question of contribution, which ought to be settled under the order to wind up the British Provident Society. [The VICE-CHANCELLOR: The shareholders are not identical.] If so, what was the position of these shareholders who were still

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Argument.

shareholders in the Anglo-Australian Company? Those shareholders who had executed might claim, possibly, an indemnity out of the blended funds, but those who had not executed had clearly no right to deal with the funds of the British Provident Society. The prayer ought to ask merely that such of the shareholders as had gone in and executed might be indemnified.

Secondly, the agreement was *ultra vires* by both companies, and could not be maintained. The transfer was the act of the directors, not of the companies, and was not binding; but by the deed of settlement the directors, before concluding such arrangement, were bound to have proposed it to the shareholders to be ratified at a meeting of shareholders duly appointed. In the case of the *Royal Bank of Australia*, (*a*) where loss had been sustained by the misrepresentation of the directors, the Court held it must fall on them and the company.

In the case of *Winch* v. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (*b*), where one company granted a lease for 99 years to another without the authority of Parliament, the Court held that it was a contract savouring of illegality, the performance of which this Court would restrain. In *Salomons* v. *Laing* (*c*) the Court held that a railway company was bound to apply its funds strictly in conformity with its Act, and the same principle applied to all public companies.

This was really a bill for specific performance of the agreement, but it was a fatal objection to such a suit that the plaintiffs had been guilty of misrepresentation: *Cadman* v. *Horner* (*d*), *Cox* v. *Middleton* (*e*).

On the whole it was submitted that the original bill ought to be dismissed with costs, and a decree made in the cross-bill that the deed ought to be cancelled.

(*a*) 2 De G. M. & G. 522.
(*b*) 5 De G. & Sm. 562.
(*c*) 12 Beav. 339.
(*d*) 18 Ves. 10.
(*e*) 2 Drew. 209.

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Judgment.

THE VICE-CHANCELLOR:—

This transaction was not an amalgamation, as has been contended: it was a transfer of all the property and effects of one company to the other. The original bill was filed by the Anglo-Australian Company to obtain from this Court a decree which should give them the benefit of that clause in the deed of June, 1858, by which the defendants, the British Provident Society, undertook to indemnify the shareholders of the plaintiffs' company against all demands that might be made against the plaintiffs' company subsequently to the transactions carried out by the deed of June, 1858. The most prominent ground of defence is, that the deed which contains the clause of indemnity was obtained by fraud and misrepresentation. That seems to me the most important question in the cause. It is so important a question that the Vice-Chancellor Kindersley was induced to give leave to the defendants to the original bill to file a cross-bill to have the deed set aside upon the ground of fraud and misrepresentation. That cross-bill prays relief upon no other ground. It prays no relief upon the ground of informality in the execution of the deed, of want of authority, or want of capacity in the parties to bind themselves; it seeks relief upon the single and simple ground of fraud and misrepresentation, on which Vice-Chancellor Kindersley gave leave to file a bill to set aside the deed. The evidence upon both sides has been gone through, and the case alleged by the British Provident Society of fraud and misrepresentation seems to be wholly unfounded; and unquestionably, if the facts had been fairly presented to Vice-Chancellor Kindersley, he never would have given leave to file such a bill. It must be dismissed with costs. The effect of that will be, that those who are contributories to the winding-up before Vice-Chancellor Kindersley will have to bear the

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costs of this suit, which has been instituted without any reasonable ground. There remains only the question as to the informality of the deed, or rather as to the alleged incapacity of the two companies to make any valid arrangement such as is purported to be made by the two deeds of June and October.

The common seal of the company is affixed to both deeds. To the second deed, which recites the first, and is consequential upon it, both companies, the defendants' company and the plaintiffs', are made parties in the character of companies—of corporations. Even if there had been, what I cannot see upon the evidence, any want of authority or neglect of duty on the part of Mr. Sheridan and the others who, on behalf of the British Provident Society, made the necessary inquiry before they sanctioned the agreement carried into effect by these deeds—if there had been any evidence of any failure or neglect of duty upon their part, after what has taken place it is impossible that it can form a ground of defence to this suit. The company, *quâ* company, have adopted both deeds, and the defendants' company, the British Provident Society, as a company, have had transferred to them, and have had all the benefit that they can have of all the property and effects and business which was transferred to them by these deeds. Therefore that ground of defence on the part of the British Provident Society seems to fail.

It is said, however, that, even if the deed should not be set aside for misrepresentation, and even if the deeds should be considered valid deeds, yet that the conduct of the plaintiffs' company has been such that this Court ought to refuse its assistance in the way which is asked by the prayer of the bill, and ought to leave the plaintiffs' company to such remedy, if any, as they may have at law. But there is no evidence of any conduct on the part of the plaintiffs' company, or of any of those who repre-

sented them, which would justify the Court in saying that they are not entitled, so far as they can have it, to the full benefit of all the stipulations on both these deeds. It is clear that the defendants' company have had the benefit of it, and, having had the benefit, I think they are bound by the obligations in the deed; and in particular I think they are bound by that obligation to indemnify the shareholders of the plaintiffs' company in respect of which relief is sought in this suit.

The decree, therefore, must declare that the defendants, the British Provident Society, are, according to the terms of the indenture of the 1st June, 1858, in the pleadings mentioned, out of the funds and property of the said British Provident Society absolutely to hold harmless and indemnify the shareholders of the plaintiffs' company against all liabilities in respect of the said plaintiffs' company, by reason of the execution by such shareholders, by themselves or their lawful attorneys, of the deed of settlement of the said plaintiffs' company; and decree the same accordingly. The cross-bill must be dismissed with costs to be taxed and paid out of the assets of the said British Provident Society; tax plaintiffs' costs of the original bill; and order, in like manner, the payment of these costs out of the assets of the said British Provident Society; liberty to apply.

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Feb. 27 & 28.

MARRIOTT *v.* KIRKHAM.

In a suit for foreclosure or sale, the surviving trustee and executrix of the mortgagor, being also tenant for life of the mortgaged property, sufficiently represents the persons interested in remainder.

THIS bill was filed for the purpose of obtaining the foreclosure or sale of certain property in Cheshire. By an indenture of mortgage dated the 6th day of April, 1818, one John Kirkham demised the property in question to Peter Snelson, his executors, administrators, and assigns, for the term of 1000 years, subject to a proviso for redemption on payment by the said John Kirkham, his heirs, executors, or administrators, of the sum of 300*l.* with interest.

At the time when the bill in this suit was filed the said term of 1000 years and the mortgage debt were vested in the plaintiff Annie Maria, the wife of the plaintiff Robert Marriott.

The said John Kirkham by his will dated the 7th day of May, 1850, after a specific devise to his wife the defendant Sarah Kirkham, gave, devised, and bequeathed his leasehold property, and all the residue of his real estate, to his said wife and to S. H. B. Bond, their heirs, executors, administrators, and assigns respectively, upon trust, to permit his said wife to receive the rents and profits thereof for her life, and after her death he directed his trustees to sell all his real estate, and to divide the money to arise from the sale thereof into three equal portions, and to pay the said portions respectively to the persons therein mentioned. And he appointed his wife the defendant Sarah Kirkham and the said S. H. B. Bond to be the executors of his said will. The said John Kirkham died on the 16th day of October, 1851, and his will was proved by both the said executors on the 16th day of October, 1852.

S. H. B. Bond died on the 16th day of October, 1858.

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MARRIOTT v. KIRKHAM.

The bill was filed on the 15th day of June, 1861, against Sarah Kirkham, the surviving trustee and executrix of the will, as sole defendant.

Argument.

Mr. *Bardswell*, for the plaintiffs, now asked for a sale of the property.

Mr. *Renshaw*, for the defendant, objected that the persons interested in remainder under the will of John Kirkham ought to be parties to the suit, and secondly, that it was contrary to the practice of the Court to decree an immediate sale.

Mr. *Bardswell*, in reply, referred to 15 & 16 Vic. c. 86, s. 42, rule 9, and cited *Goldsmid* v. *Stonehewer* (*a*), *Hanman* v. *Riley* (*b*), *Siffken* v. *Davis* (*c*).

Judgment.

THE VICE-CHANCELLOR was of opinion that, as the defendant was the surviving trustee and executrix of John Kirkham's will, and also tenant for life of the mortgaged property, the persons in remainder were sufficiently represented. He therefore decreed an immediate sale.

See also *Sale* v. *Kitson* (*d*), *Wilkins* v. *Reeves* (*e*), *Cropper* v. *Mellersh* (*f*).

(*a*) 9 Hare, App. 38.
(*b*) Ibid. 40.
(*c*) Kay, App. 21.
(*d*) 3 De G. M. & G. 119.
(*e*) 24 L. T. Rep. 337.
(*f*) 24 L. J.Ch. 430.

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March 13, 14.

DILROW *v.* BONE.

Where, in a voluntary deed containing a clear declaration of trust of real estate, and professing to operate by appointment to trustees in exercise of a power, the limitation and conveyance were to the trustees, their executors, administrators, and assigns, omitting the word "heirs," the Court held that the real estate was impressed with the trust, and declared the heir-at-law of the settlor a trustee for the *cestui que trust*.

THE bill in this case was filed by certain *cestuis que trust* under a voluntary deed, for the purpose of obtaining relief against a defective limitation and conveyance to the trustees.

By an indenture dated the 30th of June, 1835, and made between Edmund Bone and Mary his wife, of the one part, and John Fulleck and Richard Hearsey of the other part, after reciting that, by an indenture or deed of covenant dated the 27th of November, 1811, and made between said Edmund Bone and Mary his wife, of the one part, and a fine *sur cognizance de droit come ceo*, &c., levied in pursuance thereof, the messuages, lands, and hereditaments thereinafter described were conveyed and assured unto William Hogsflesh and his heirs "to the use of such person and persons, in such parts and proportions, upon such trusts and for such estates and interests, and chargeable in such manner and subject to and under such uses, ends, intents, and purposes as they the said Edmund Bone and Mary his wife, during their lives, by any deed or deeds, instrument or instruments in writing, to be by them duly signed, sealed, and delivered in the presence of and attested by two or more credible persons, should direct, limit, or appoint, or grant, bargain, sell, release, or convey the same, or any part or parts thereof; and in default of and until such direction, limitation, or appointment, to the use of the said Edmund Bone and Mary his wife, during their joint natural lives; and, after the decease of either of them, then to the only proper use and behoof of the survivor of them, his or her heirs and assigns for ever;" and also reciting certain deeds of mortgage and further charge, and of assignment,

appointment, and confirmation of mortgage; and reciting that there was issue of the said Edmund Bone and Mary his wife seven children, viz., Ann widow of John Dilrow, William Bone, Harriet Bone, Benjamin Bone, Mary Bone the younger, Jemima wife of Edward Jarlett, and Edmund Bone the younger; and reciting "that the said Edmund Bone and Mary his wife *were desirous of exercising the power of appointment* given or reserved to them by the said thereinbefore recited indenture and fine in manner thereinafter mentioned,—it was witnessed that, in exercise and execution of the said power and authority to them for that purpose reserved and given as aforesaid," and for a nominal consideration, "they the said Edmund Bone and Mary his wife, by the then present deed or instrument in writing by them respectively signed, sealed, and delivered in the presence of and attested by the two credible persons whose names were indorsed as witnesses thereto, did direct, limit, and appoint that, immediately from and after the decease of the survivor of them, the said Edmund Bone and Mary his wife," all the messuages, lands, and hereditaments therein particularly described, containing by estimation sixty-one acres in the parish of Liss, in the county of Southampton, known by the name of Bale's Farm, with the rights, members, and appointments thereto belonging (subject nevertheless to the mortgages thereinbefore mentioned), should go, remain, and be "unto and to the use of the said John Fulleck and Richard Hearsey, *their executors, administrators, and assigns,*" upon the trusts thereinafter declared. "And it was thereby further witnessed that, for the considerations aforesaid, they, the said Edmund Bone and Mary his wife, granted, bargained, sold, aliened, released, and conveyed all that their clear right and equity of redemption of and in all other their estate and interest therein, subject nevertheless to the said mortgage securities, and save and except and without prejudice to the estate of their joint lives, and

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Statement.

the estate for life of the survivor of them, and subject thereto respectively, unto the said John Fulleck and Richard Hearsey, *their executors, administrators, and assigns,*" upon certain trusts which were then declared to be for sale as therein mentioned, and to divide the balance of the purchase-monies, after payment and satisfaction of the mortgage debt and expenses of sale, into seven equal parts, and to pay one of every such parts or shares to or for the benefit of each of the seven children of Edmund and Mary Bone respectively; as to six of such shares, to them, their executors and administrators, absolutely; and as to one of such shares, in trust for Mary Bone for life, and after her death for her brothers and sisters, as in the said deed mentioned. The deed also contained a joint power of revocation to Edmund Bone and Mary his wife.

The joint power was never in fact exercised, and on the 5th of October, 1836, Mary Bone died. William Bone, the eldest son of Edmund and Mary Bone, died on the 20th of November, 1850, intestate, and no administration of his estate was ever taken out. On the 30th of May, 1855, Richard Hearsey, one of the trustees, died, and by an order of the Court, dated the 14th of March, 1856, new trustees were appointed of the deed of the 30th of June, 1835, in the room of the former trustees, and it was ordered that the lands subject to the trusts of the indenture should vest in the new trustees "for the estate therein of the trustees named in the said indenture." John Fulleck, the surviving trustee of the indenture, died on the 19th of October, 1858. Edmund Bone the elder died on the 19th of January, 1860.

Shortly after his death Henry Lacy and William Peskett, the present trustees, proceeded to a sale, when, upon investigation of the title, it was found that (as the bill alleged) "by mistake or inadvertence" the estate was limited after the death of the survivor of the two

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settlors to the trustees, their "executors, administrators, and assigns" only, and not their "heirs," so that the legal estate was now vested in the infant defendant William Bone, as heir of William Bone deceased, the eldest son of Edmund Bone, the settlor.

Statement.

This bill was accordingly filed by the six surviving children of Edmund and Mary Bone, against the infant heir and the trustees, praying that the infant defendant, William Bone, might be declared a trustee of the hereditaments comprised in the said indenture of the 30th of June, 1835, for the benefit of the parties interested under the said indenture, and that for that purpose the legal estate now vested in the infant defendant might be vested in the said trustees upon the trusts of the indenture of the 30th of June, 1835, or that, if necessary, the said indenture might be rectified.

It was sworn in the affidavit of the solicitor who prepared the deed of June, 1835, that the intention of Edmund Bone the elder and Mary his wife was, that the fee in the lands therein comprised should be vested in the trustees thereof, for the purpose of effecting a sale and dividing the proceeds of such sale as above mentioned; and that his instructions were to prepare the necessary deed to effect such intention.

Argument.

Mr. *Malins* and Mr. *Briggs*, for the plaintiff, opened the case, but on the evidence being read his Honour called on the counsel for the infant heir.

Mr. *Hitchcock*, for the infant heir-at-law.—The deed was very accurately drawn; the omission, twice over, of the word "heirs" in the gift to trustees could not be attributed to ignorance; whilst it was quite consistent with the supposition that it was the intention of the settlors that the trustees should, if necessary, mortgage for a term only, and not in fee. Without clear words the Court would not exclude the heir-at-law.

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But, even assuming that it might have been the intention of the appointors and settlors to have limited an estate in fee in the trustees, yet, inasmuch as the appointment and conveyance were voluntary, this Court would not enforce a mere voluntary deed: *Dillon* v. *Coppin* (*a*), *Ellison* v. *Ellison* (*b*), *Pulvertoft* v. *Pulvertoft* (*c*).

In *Bridge* v. *Bridge* (*d*) the Master of the Rolls held a voluntary settlement of a real estate ineffectual, the legal estate not having passed to the trustee.

In *Weale* v. *Ollive* (*e*) it was held that the Court will not assist a volunteer by making effectual an incomplete gift. In *Dening* v. *Ware* (*f*) the Court refused its assistance to compel a voluntary settlement to be executed. In *Woodford* v. *Charnley* (*g*) the same doctrine was laid down. In *Donaldson* v. *Donaldson* (*h*) the transfer of stock was decreed but only because the gift was complete. In *Jefferys* v. *Jefferys* (*i*), where the gift as to freehold property was complete, and as to copyholds imperfect, and the bill sought relief as to both, relief was granted as to the freeholds, but as to the copyholds the bill was dismissed with costs. [*Crouch* v. *Waller* (*k*); Dart's V. & P. 676; Davidson's Prec. Vol. 3, 842, 2nd ed., were cited.]

[As to the effect of filing a bill, *Martin* v. *Mitchell* (*l*) was cited.]

Mr. *Jervis* appeared for the trustees.

Judgment.

THE VICE-CHANCELLOR:—

The instrument, which contains a clear declaration of

(*a*) 4 M. & C. 647.
(*b*) 6 Ves. 656.
(*c*) 18 Ves. 84.
(*d*) 16 Beav. 315.
(*e*) 17 Beav. 252.
(*f*) 22 Beav. 184.
(*g*) 28 Beav. 96.
(*h*) Kay, 711.
(*i*) Cr. & Ph. 138.
(*k*) 4 De G. & J. 302.
(*l*) 2 J. & W. 425.

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trust, professes to operate by an appointment to trustees in exercise of a power, and it also contains clear and distinct words of conveyance in a further witnessing part. It is impossible to say that by the operation of those words of conveyance some legal estate did not pass from the settlor. Upon the intention apparent from the whole scope of the deed and its language it is certain that the intention was to give an absolute legal estate to the two persons who are named as trustees, and upon whose legal estate the trust is grafted. Lord Eldon, in the case of *Ellison* v. *Ellison* (*a*), says: "I take the distinction to be, that if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*, as upon a covenant to transfer stock, &c.; if it rests on covenant, and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet, *the legal conveyance being effectually made*, the equitable interest will be enforced by this Court." It is true that Lord Eldon says, "has completely transferred or completely conveyed;" but I cannot understand upon what principle it can be said that, if there was a transmutation of possession —there being a determinate estate created in intelligible terms, but with this effect, that what upon the whole scope of the instrument was intended to vest the fee simple in the trustees conveyed only a freehold for life— this Court should decline to enforce the performance of the trust. I consider it, therefore, my duty in this case to give the relief, in substance, as prayed by the bill. I do not think it necessary to go at length into the authorities that have been cited, because there were two cases before me not long ago: *Airey* v. *Hall* (*b*), and *Voyle* v.

(*a*) 6 Ves 656, 662. (*b*) 3 Sm. & Giff. 315.

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Judgment.

Hughes (*a*), in which I endeavoured to distinguish some of the various decisions which have been made on the subject of voluntary gifts. The declaration will be, that the heir of William Bone is a trustee, and there will be an order that the legal estate may be vested in trustees to be appointed by the Court. In my opinion a trust is so attached to the property in this case that the infant heir of the settlor holds the estate with this trust attached to it in his hands.

(*a*) 2 S. & G. 18.

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March 19.

MANCHEE *v.* KAY.

A legacy given thus, "£1.0.0," which stood between two other legacies for 100*l.* each, the dots between the figures being smeared as if for the purpose of obliteration—*Held* to be a legacy for 100*l.*

THE question raised in this case was, whether a legatee was entitled to a legacy of 1*l.* or 100*l.* under these circumstances.

The testator, by his will, made the following disposition:—

"The last will and testament of John Manchee, of 10, Cliff Terrace, Margate, this is to say after all my debts an funeral expenses are settled an paid I bequeath to my wife Ann Manchee the sum of £1 1s. 0d. weekly for her sole an separate use *untill* her death an while she lives single and *chace* an at her death all my property of whatever description to be sold and the proceeds to be divided as follows:—

To my sister Susan Kay the sum of one	£100.
To my brother Peter Manchee	£1.0.0.
To my sister Mary Spiller	£100.
To Mrs. Susan Smith	£50.
To Mr. Manchee sister Hannah Epps	£50.

"And the remainder to be equally divided amoang all my nephews and nieces all shares alike. My wife Mary Ann Manchee executrix, my nephew John Kay executor, my nephew John Manchee executor. December, 1854."

The second legacy, which was given to Peter Manchee, was placed between the two legacies of 100*l.*, but the figure "1" was placed out of the line, and rather to the left. The two dots between the figures were smeared as

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if it had been attempted to obliterate them. The dots appeared to have been added to the figures subsequently.

The chief clerk certified as follows:—

Statement.

"As to the said legacy of 100*l.* it appears from the original will that it was given in figures representing 100*l.* with spaces between them sufficient for and having dots or marks to indicate the sum of £1.0.0, but which figures and dots are smeared, but not so as to effect any alteration sufficient to show that the testator intended the bequest to be for 100*l.* instead of £1.0.0, and unless upon inspection of the said will and the evidence annexed the Court should be of a contrary opinion."

Argument.

Mr. *Martindale* appeared for the plaintiff and submitted the question to the Court.

Mr. *Bevir* and Mr. *E. G. White* appeared for other parties.

Judgment.

THE VICE-CHANCELLOR said he thought it was reasonably clear the testator intended to give a legacy of 100*l.* to his brother Peter Manchee.

Declaration accordingly.

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WARD *v.* HIPWELL.

March 11 & 12.

The trust deed of a Baptist chapel provided that the trustees should allow the minister to occupy a house (part of the trust property); but in case he did not occupy it authorised the trustees to let it and apply the rents to pay off the mortgage. The trustees, without offering it to the minister, let the house to another person for the alleged purpose of applying the rent to pay off a mortgage: but the Court set the lease aside, and ordered possession to be given to the minister.

The majority of trustees of a Dissenting chapel have no right to deal with the trust property otherwise than according to the true construction of the deed of trust.

THIS bill was filed by J. Ward, J. Spencer, and W. Wright the elder, three of the trustees, and Samuel J. Wheeler, the minister, of a "Peculiar" Baptist chapel at Sharnbrook, and George Sturges the younger, on behalf of themselves and all other the members of the Baptist church and congregation at Sharnbrook, against the three other trustees, and one W. Islip. The bill prayed, first, that S. J. Wheeler, the duly-appointed minister, might be declared entitled to the occupation of the said house. Secondly, that the defendant Islip might be decreed to deliver up possession of the said house, and that an agreement of the 15th of September, 1860, might be cancelled; and that the defendant W. Islip might be ordered to pay an occupation rent for such house.

The bill stated that in 1719 a considerable number of the inhabitants of Sharnbrook, who belonged to the "Peculiar" Baptist denomination of Protestant Dissenters, formed themselves into a congregation for the purpose of Divine worship according to the tenets of that denomination. That in 1839 the chapel in which the said congregation now worship was conveyed to trustees, now represented by the present plaintiffs and defendants, upon trust for the benefit of the said society of Peculiar Baptists.

On the 24th of November, 1843, a deed of the same date, and made between W. Hipwell of the first part, and J. Ward, T. Collier, W. L. Wykes, W. Dickens, W. Wright the elder, J. Spencer, and George Pratt, of the second part, which reciting that the parties of the second part being trustees of the Baptist meeting-house and other hereditaments at Sharnbrook, were desirous of

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providing a suitable dwelling-house for the residence of the minister or preacher for the time being of the said meeting-house; that they had contracted with Mr. Hipwell for the purchase of the piece of land for 8*l.*, and had taken possession of the same, and were then building thereon a dwelling-house as a residence for the said minister, and that the cost of such purchase and erection was defrayed by the trustees out of certain funds placed at their disposal. The deed then witnessed that Mr. Hipwell appointed the said piece of ground "to the use and behoof of them the said James Ward, Thomas Collier, W. L. Wykes, William Dickens, William Wright the elder, Joseph Spencer, and George Pratt, their heirs and assigns, upon trust that they the said parties thereto of the second part, together with the said William Hipwell, or other the trustees or trustee for the time being of those presents, did and should permit and suffer the then present minister or preacher, and every future minister or preacher for the time being of the said meeting-house at Sharnbrook aforesaid, duly chosen and appointed, such minister or preacher, according to the regulations and stipulations for the choice and appointment of a minister or preacher over the said church and congregation usually worshipping at the said meeting-house, to have, hold, use, occupy, and enjoy the said messuage, tenement, or dwelling-house and premises, during so long a time, and in such manner and under such regulations, as the said trustees, or majority of them, should from time to time order and direct."

And it was further declared and agreed that "in case the same should not be occupied and tenanted by such minister or preacher as aforesaid, it should be lawful for the said trustees, or the trustees or trustee for the time being of those presents, to let the same to any person or persons, in such manner and under the like regulations

as aforesaid, and to receive and take the rents, issues, and profits thereof, and did and should stand possessed thereof, upon trust, in the first place, to pay and apply the same in payment and discharge of all costs and charges that might be lawfully expended and incurred in the due execution of the trust thereby reposed in them, and after such payment did and should pay and apply the residue, if any, in discharge of any mortgage or mortgages, or the interest thereof, or other incumbrances, if any, upon or affecting the said trust premises, made pursuant to the power thereinafter contained for that purpose," and upon further trusts. The power referred to was as follows:—" And it is hereby also further agreed and declared, and that it shall be lawful for the said trustees, or the trustees or trustee for the time being hereof, if it shall be deemed requisite so to do, to raise such sum or sums of money as may be required by way of mortgage upon the said trust premises, or any part thereof, and likewise to convey and assure the same for that purpose."

The third paragraph of the bill stated by amendment that the purchase-money and cost of erecting the house was provided as follows: 200*l.* was left by Mr. John Talbot towards the building, and in 1844 200*l.* was borrowed to complete the building. This last-mentioned sum of 200*l.* was paid off in 1846, partly by 100*l.* collected by voluntary subscription among the congregation, and partly by 100*l.* which was borrowed of the plaintiff James Ward on a note of hand, signed by some of the trustees and members of the congregation; at the same time the conveyance of the land by the said Thomas Collier was handed to the plaintiff James Ward. The house was not finished till the year 1847, after which it was occupied by Mr. Williams, the then minister, until his resignation in July, 1859. The house was occupied

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for one month by a Mr. Evans, who was probationary minister to the congregation.

The plaintiffs alleged that the house was furnished by the congregation on the express condition that it was to be used for the residence of the minister. On this point there was a conflict in the evidence, the defendant alleging that before Mr. Williams took possession the furniture and goods were (with the exception of a sofa given to the house by Mr. Ward) given to Mr. Williams by Mrs. Hipwell, Mrs. Williamson, and other ladies of Sharnbrook and the neighbourhood. These ladies wrote to Mr. Williams, offering him the furniture for his acceptance, telling him the house was comfortably furnished for him. On his quitting Sharnbrook Mr. Williams authorised Mr. Hipwell to sell the furniture (except the sofa), which he did, and the money was paid to Mr. Williams for his own benefit.

On the 4th of July, 1860, at a meeting consisting of eleven out of eighteen members which constituted the church, Mr. S. J. Wheeler was unanimously elected pastor of the said church. The election was communicated to Mr. Wheeler, who afterwards received a written request from about 200 of the congregation; on which he accepted the offer. After this election several applications, personally and otherwise, were made to the defendants Hipwell, and to give up possession of the house to the minister S. J. Wheeler.

On the 27th of July, 1860, the defendant Hipwell had a meeting of the trustees, of which he had previously given notice, in which it was resolved that the house, which had remained unoccupied, should be let to the defendant Islip, for his sister, who immediately took possession, but no written agreement was signed until the 27th of September, 1860.

About the 18th of September, 1860, Mr. Ward received the following letter:—

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"Sharnbrook, near Bedford,
"September 20th, 1860.

"Mr. James Ward,

"Dear Sir,—I think it best to inform you that at a meeting of the trustees of the house lately occupied by the Rev. T. Williams, deceased, held on the 27th of July last, of which you had notice, but were not present, it was resolved to repair the fence, &c., and then let the premises to repay the debts and interest, &c., and acting under the advice and counsel of an eminent solicitor, according to a copy of the deed you hold, we have repaired and let the place to Mr. W. Islip, for his sister's residence, for the sum of 20*l.* per year. An account of moneys paid and received will be kept until the debts are paid.

"Yours respectfully,
"WM. HIPWELL."

The bill alleged that Mr. W. Islip was a farmer holding property in the village, where he had resided for many years, and was well acquainted with the fact that the said house was built and intended only for the occupation of the minister of the said chapel.

On the 27th of September, 1860, a public meeting of the church and congregation was held at the chapel with reference to the letting of the house, at which the above letter was considered, and Mr. Ward, in compliance with the request of the meeting, wrote to Mr. Hipwell the following letter:—

"Souldrop, 28th September, 1860.

"Sir,—The old Baptist Church at Sharnbrook has demanded of me the house which, according to the deeds, is the residence for their minister: therefore I write in order that you may deliver up the key on or before the

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1st of October, 1860, in order that they may take possession.

"Your truly,

"JAMES WARD."

Mr. Wheeler also gave formal notice to Mr. Islip that the house was for the residence of the minister.

On the 31st of October, 1860, the plaintiffs took forcible possession of the house, but on the same night they were forcibly ejected by the defendant Islip and eight or ten men with him.

The bill alleged that the house had been mortgaged for 100*l.* to the defendant Ward, who had not applied nor was desirous of the repayment of the loan.

The three trustees who had let the house were William Hipwell, William Lawton Wykes, and William Dickins, and they contended that the minister had not been duly elected, and that it was necessary to make provision for payment off of the mortgage.

The defendant W. Dickins subsequently stated that he had never consented to let the house for seven years to Mr. Islip, and on the 2d of January, 1861, sent Mr. Hipwell the following letter:—

"Sharnbrook, 2d January, 1861.

"Dear Sir,—I have now had an opportunity of hearing the trust deed of the minister's house of Sharnbrook Chapel read, of which I am one of the trustees, and I now write to inform you that I have altered my mind as to its being let to a stranger, and wish the present minister of the chapel (Mr. Wheeler) to be let into possession thereof according to the trusts of the deed.

"Yours truly,

"WILLIAM DICKINS.

"Mr. Hipwell."

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The plaintiff's solicitor offered on behalf of the plaintiffs and the church, to pay any small sums expended in repairs by the trustees, and to pay Mr. Islip any monies expended by him on the place, and to relieve the trustees from the mortgage. The defendants having refused to restore the house, the plaintiffs filed this bill, praying (as amended)—

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First, that S. J. Wheeler, as duly-appointed minister, might be declared entitled to the house.

Secondly, that the defendant, W. Islip, might be ordered to deliver up possession of the house so let to him as aforesaid, and the agreement of the 13th of September, 1860, might be cancelled, and the defendant Islip ordered to pay an occupation rent.

Thirdly, that the trusts of the indenture of the 24th of June, 1843, might be administered under the direction of the Court. [Pending the suit the plaintiff Wheeler died. But it was agreed that no objection should be taken on that ground to the decision of the question in the cause.]

Argument.

Mr. *Malins* and Mr. *F. J. Turner*, for the plaintiff, contended that there was a clear dedication of the house to the use of the minister, and that without his consent, or, at all events, without his having refused to occupy the house, the trustees had no power to depart from the clear trusts of the deed.

The plaintiffs also contended on the merits that the defendants had been guilty of improper conduct: *Perry* v. *Shipway*(*a*), was cited.

Mr. *Craig* and Mr. *Townsend*, for the defendants, contended, first, that the minister had not been properly elected, and if so the trust for the benefit of the house had not arisen; and on this point they cited *Rex* v. *Lang-*

(*a*) *Antè*, vol. 1, p. 1.

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horn(*a*); *Cortis* v. *The Kent Waterworks Company*(*b*); *Rex* v. *Whitaker*(*c*).

Secondly, they contended that the resolution to let the house was perfectly valid; notice had been duly served on all the trustees, and therefore the act of those who attended in pursuance of such notice was binding: *The Attorney-General* v. *Scott*(*d*).

Thirdly, it was submitted that this Court would not encourage suits like this of little importance: *The Attorney-General* v. *Shearman*(*e*).

Judgment.

The VICE-CHANCELLOR:—

The purchase-deed, after vesting the house, which was then in the process of building, in the trustees, declared, as a primary trust and a primary purpose, that the trustees should permit the minister for the time being to reside in and occupy the house. There is a declaration that, in case the minister should not reside in the house, there should be power to the trustees to let it, and that the rents and profits should then be applied in discharge of a mortgage, and for other purposes therein specified. The primary purpose, therefore, is residence and occupancy of the house by the minister, for the benefit of the congregation. The congregation enjoy the benefit of these trusts by having the service of a minister, who is to be allowed to reside in the house. In order, therefore, to prevent the minister from making a profit of the house by underletting it, the trustees, in case the minister does not reside in the house, are authorised to let it. The plan of letting the house seems to have been formed by a section of the trustees who disapproved of the election of Mr. Wheeler as minister. Accordingly, just seven days before his election was to have been completed,

(*a*) 4 Ad. & Ell. 538.
(*b*) 7 B. & Cr. 314.
(*c*) 9 B. & Cr. 648.
(*d*) 1 Ves. sen., 414.
(*e*) 2 Beav., 104.

this portion of the trustees let the house to the defendant Islip for a term of years.

It has been argued for the trustees that, according to the true construction of the deed, they were justified in letting the house in order to get the rents and pay off a mortgage. But it is very clear that the trusts for the benefit of the minister apply just as much to the equity of redemption of the property as to the property itself, if it were free from any mortgage. The existence of a mortgage on the property is clearly an event contemplated by the deed, and, according to its true construction, it is impossible to say that the existence of a mortgage was a reason why the trustees should deprive the minister of the power of residing in it. Therefore, it seems to me immaterial to consider whether those of the trustees who let the house are a majority. The majority of trustees have no right to bind themselves or the minority to any mode of administering the trusts which is not conformable to the trusts as declared. The lease, therefore, must be set aside.

As to the costs there is nothing in the constitution of the suit, or in the death of Mr. Wheeler, to make the conduct of the defendants appear in so favourable a light as that this Court should say they were acting so honestly upon a wrong notion as that other persons should pay for the costs of setting them right. Therefore, the defendants must be decreed to pay the costs of the suit.

If the plaintiffs ask for possession, the question is whether a minority who are right in their construction of the trust should not have possession?

Ultimately, plaintiff's counsel not asking for possession to be given to the plaintiffs exclusively, possession was ordered to be given to the trustees generally, with liberty to apply.

1862.

April 24th.

SAUNDERS *v.* ROTHERHAM.

Where a testatrix directed her executors to continue the business of a public house, and to employ W. as manager at a salary, and at the expiration of the lease the goodwill, &c. &c., to be sold, the Court refused to accelerate the sale at the instance of the residuary legatee, a sale not being required for payment of debts.

MARIANNE GAYDON, of the "Griffin," 28, Half Moon Street, Piccadilly, by her will, after directing payment of her just debts, personal and testamentary expenses, and giving certain specific bequests, gave and bequeathed all that messuage or tenement and premises in 28, Half Moon Street, Piccadilly, unto Charles Rotherham, of Mosbro Hall, Eckington, Derby, his executors, administrators, and assigns, upon trust, that he the said C. Rotherham, his executors and administrators, and the trustees or trustee for the time being of this my will to be appointed in pursuance of the power hereinafter contained, do and shall as soon as conveniently may be after my decease sell and dispose of all my said estate and effects (except the said leasehold, &c. &c., and except the several articles and things hereinafter specially given and bequeathed), and call in and convert into money all such or parts of my estate and effects as shall not consist of money. And I declare it to be my will and mind that the said C. Rotherham, his executors, and administrators, and such trustees or trustee as aforesaid, do and shall employ Thomas Wilde, now in my service, to carry on and conduct the business of a wine and spirit merchant and licensed victualler now carried on by me at No. 28, Half Moon Street aforesaid, until the expiration of the said lease, and that they shall allow the said Thomas Wilde out of the said profits of the said business such salary for his services as they may think reasonable. And I also direct that it shall be lawful for the said Charles Rotherham, his executors and administratosr, and his trustee or trustees as aforesaid, to retain out of the said profits, not only the ground rent, insu-

rance, and all other costs, charges, and expenses that he or they may incur in relation to the said premises, and in carrying on the said business, but also a reasonable compensation for his and their trouble and loss of time and travelling expenses. And after the expiration of the said lease, then I direct that the said Rotherham, his his executors and administrators, and such trustee and trustees as aforesaid, do and shall sell and dispose of the said business and the goodwill thereof, and the stock in trade, and the fixtures and furniture in or about the premises, by public auction or private contract, &c. And I direct that my said trustees do and shall after payment of debts, personal and testamentary expenses, according to the direction hereinbefore contained, as early as convenient after my decease, pay the several legacies hereinafter given and bequeathed, *i. e.*, Thomas Wilde the sum of 50*l.* (then followed several legacies). And as to all the rest and residue and remainder of my estate and effects of what nature soever I give and bequeath the same to the said George Henry Saunders, his executors, administrators, or assigns, to and for his and their own absolute use and benefit, and I hereby declare and direct that it shall be lawful for the said Charles Rotherham, his executors or administrators, and such trustees as aforesaid, and he and they are expressly authorized to postpone the payment of any pecuniary legacies hereinbefore given and bequeathed till after the expiration of the said lease and the disposal and realisation of the said business, goodwill, fixtures, and effects belonging to the said premises.

On an administration summons being taken out by the residuary legatee on the 12th November, 1861, the usual accounts and inquiries were directed, and, *inter alia* (7), "an inquiry when the lease of No. 28, Half Moon Street referred to in testatrix's will will expire, and whether it is fit and proper that the said business should be carried on by

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defendant as directed by testatrix's will, or that the goodwill, stock in trade, and fixtures and furniture of the said lease should be sold and disposed of. The chief clerk by his certificate dated the 28th of February, 1862, certified that the personal estate not specially bequeathed amounted to 917*l.* 1*s.* 4*d.*; that the executor had paid or was entitled to be allowed 790*l.* 16*s.* 11*d.*, leaving a balance of 126*l.* 4*s.* 5*d.* due from him; that the debts amounted to 227*l.* 10*s.* 10*d.*; that the legacies amounted to 1335*l.*"

The chief clerk as to inquiry 7 found that the lease of the house and premises No. 28, Half Moon Street aforesaid referred to in the said testatrix's will would expire on the 29th day of September, 1861.

"That it is fit and proper that the goodwill of the said business, the stock in trade, and fixtures and furniture on the said premises, and the said lease, should be forthwith sold if the Court shall be of opinion, having regard to the terms of the will of the said testatrix, the state of her assets as herein appears, and to the debts remaining unpaid, that a sale thereof can be now made."

"If the Court shall be of opinion that such sale cannot now be made, it is fit and proper that the said business should be carried on by the defendant as directed by the will of the testatrix."

The said lease is deposited with Messrs. Reid & Co., of Liquorpond Street, brewers, to secure any debt owing to them, and which the defendant states is now 235*l.* or thereabouts. The evidence consisted of affidavits from several surveyors to the effect that in consequence of the International Exhibition the goodwill of a public house in that vicinity would sell much more favourably "than if postponed until the expiration of the lease."

Argument.

Mr. *Hardy*, for the residuary legate, contended that the property ought to be sold, in which case there would

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be a certainty of the residuary legatee getting something. The only person interested in carrying on the business was Mr. Wilde, who had no interest in anything but his commission or salary. It was quite clear the direction in the will that Mr. Wilde should be employed was no trust which this Court should enforce: *Finden* v. *Stephens*(*a*). In *Shaw* v. *Lawless*(*b*), on somewhat similar words, it was held that the words amounted to a trust; but that case was reversed by the House of Lords(*c*). It was submitted, therefore, that the Court would not jeopardize the legacies by directing the business to be carried on where the residuary legatee, who was alone interested in the estate after payment of the legacies, was desirous the property should be sold.

Argument.

Mr. *Rasch* appeared for Mr. Wilde, and for the executor, and submitted that the Court would not order a sale where it was not necessary for payment of the debts.

The VICE-CHANCELLOR:—

Judgment.

The principle of *Shaw* v. *Lawless* and *Finden* v. *Stephens* is this, that a devisee is not to be excluded from the beneficial enjoyment of the property clearly devised to him by a mere direction to employ a person in the management of it. The present case is entirely different.

The question is whether a certain leasehold public-house is to be sold. The testatrix by her will has created a trust for sale of the property, and has excepted this leasehold house. In plain terms she has said it shall not be sold; and she goes on to direct that the business, which she had always carried on in this public-house, should be continued by her executors, and that a person of the name of Wilde should be employed to manage the business. The testatrix directs that the business should

(*a*) 2 Phillips, 142.

(*b*) *Lloyd* v. *Gould*, Sugd. Term, 154.

(*c*) 5 Cl. & Fin. 129.

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be continued until the expiration of the lease, which appears to be about five years. The will is clear upon this point: there is an exception of the public-house from the trust for sale, and there is a direction for carrying on the business for the benefit of the estate—nay, more, there is a direction that the executor at his discretion may postpone the payment of the legacies until after the expiration of the lease. All this shows that the testatrix desired that till the expiration of the lease the business should be continued.—Still, if the rights of creditors required that the house should be sold, of course sold it must be, for the directions in the will could not be allowed to intervene the paramount rights of the creditors.

It does not appear necessary that the lease should be sold for payment of debts. On behalf of the residuary legatee it was asked what was to become of the profits, for it appears to be a profitable business. There is no doubt what the testatrix meant. It may be that after payment of the debts the profits may be required to pay the legacies; but if not required for that purpose, then of course the profits will go to the residuary legatee in the shape of residue. There is no case of election. There must be a direction to carry on the accounts and to get in the other personal estate; and that the business shall be carried on until further order; with liberty to apply.

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BOLDING *v.* LANE.

March 8, 10, *and April* 30.

BY an indenture of mortgage dated the 9th day of May, 1831, between Joseph Lane of Greenhill, in the county of Stafford, esquire (deceased), of the first part Edmund Benett of Tonbridge Wells, Kent, gentleman (deceased), and Ann his wife, of the second part, and Thomas Lane, of London, gentleman (deceased), and Walter Sprott, of Tunbridge Wells aforesaid, gentleman (also deceased), of the third part, after reciting that by an indenture of the 10th of July, 1812, between the said Edmund Bennett of the first part, Ann Bennett, the wife of the said Edmund Bennett, by her then name of Ann Lane, spinster, of the second part, and Thomas Lane and Walter Sprott of the third part, in consideration of a then intended marriage between Edmund Bennett and Ann Lane, all the right and interest of Ann Lane in one-seventh part of the moneys secured on mortgages of estates in Surrey and Sussex, and in stocks (meaning the produce of the estates of the father and mother of the said Ann Bennett in right of Ann Lane the mother), were assigned to Thomas Lane and Walter Sprott upon the trusts therein mentioned; and after reciting that the said marriage between the said Edmund Bennett and Ann Lane the daughter, was afterwards duly solemnized, and that the said Joseph Lane had proposed to Thomas Lane and Walter Sprott, as such trustees as aforesaid, to secure to them the sum of 1281*l.* 12*s.* 3*d.*, being part of the said trust premises derived from the said Ann Lane the elder, by way of mortgage upon the estate, mines, and premises therein-

The word "charge" contained in the 42d section of the 3 & 4 Wm. 4, c. 27, used in connection with the 40th section, includes mortgages: *Dearman* v. *Wyche* (*a*), and *Du Vigier* v. *Lee* (*b*), considered.

An acknowledgment by the devisee of a mortgagor fifteen years after the date of the deed *held* sufficient to entitle the mortgagee as against a second mortgagee and subsequent incumbrancers to recover the arrears of interest for more than six years.

(*a*) 9 Sim. 370. (*b*) 2 Hare, 326.

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after described, and also by his bond as thereinafter mentioned,—It was witnessed that in consideration of the said sum of 1281*l.* 12*s.* 3*d.*, so to be accounted for as aforesaid, and also of 5*s.* paid to the said Joseph Lane by Thomas Lane and Walter Sprott, he, Joseph Lane, with the consent and approbation of Edmund Bennett and Ann his wife, did bargain, sell, and demise unto Thomas Lane and Walter Sprott, their executors, administrators, and assigns, all those two several closes, pieces, or parcels of land situate, lying, and being near the end of Manor Lane, situate at Stowheath, in the parish of Wolverhampton, in the county of Stafford, to hold the said hereditaments and premises unto the said Thomas Lane and Walter Sprott, their executors, administrators, and assigns, for 1000 years, without impeachment of waste. Subject, nevertheless, to the proviso for redemption thereinafter contained at the yearly rent of a peppercorn; and in the said recited indenture was contained a proviso for cesser of the said term on payment by the said Joseph Lane unto said Thomas Lane and Walter Sprott (as such trustee as aforesaid) their executors, administrators, and assigns, of the said sum of 1281*l.* 12*s.* 3*d.*, on the 9th of May, 1838, and in the meantime half-yearly on the 9th of November and 9th of May in each year, interest for the same sum at the rate of 5*l.* for 100*l.* by the year. And in the said recited indenture was contained a covenant by the said Joseph Lane, for himself, his heirs, executors, and administrators, for payment unto the said Thomas Lane and Walter Sprott, their executors, administrators, and assigns, of the said sum of 1281*l.* 12*s.* 3*d.* and interest as therein mentioned; but the said indenture does not contain any power of sale as by the said indenture when produced will appear.

On the same day the said Joseph Lane executed a bond to the said Thomas Lane and Walter Sprott for

further securing the payment to them of the said sum of 1281*l.* 12*s.* 3*d.* and interest. Joseph Lane duly made and published his will dated the 18th day of June, 1831, and thereby gave and devised to his nephew and heir at law, the said Thomas Lane (since deceased), his heirs and assigns (among other hereditaments), all his freehold land and hereditaments, with the appurtenances, situate and being at Stowheath, in the parish of Wolverhampton, comprised in the mortgage of the 9th of May, 1831. The testator thereby appointed Thomas Lane and his son, the defendant Farindon Lane, executors of his said will.

Joseph Lane died on the 25th of August, 1831, without having revoked or altered his will, which was proved by the executors on the 29th of September, 1831. Edmund Bennett died on or about the 5th day of January, 1844. Walter Sprott died on or about the 3rd day of May, 1844.

By an indenture dated the 23rd of February, 1846, and executed between Ann Bennett of the first part, the said Thomas Lane (since deceased) of the second part, Thomas Fuller Walker of the third part, and Sydney Alleyne of the fourth part, in pursuance of a power therein mentioned, she the said Ann Bennett appointed Sydney Alleyne to be a trustee in the place of the said Walter Sprott deceased of the said settlement, and the trust property was assigned and conveyed to the new trustee on the same trusts.

By an indenture dated the 29th day of September, 1847, between Thomas Lane (deceased) of the first part, the said Thomas Lane and Sydney Alleyne of the second part, James Foster, George Jones, and John Barker therein described of the third part, and John Jones also therein described of the fourth part, in consideration of the sum of £250 paid to Thomas Lane and Sydney Alleyne, all that piece of land containing one

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acre, one rood, and four perches or thereabouts; comprised in the said indenture of the 9th day of May, 1831, were conveyed and assured unto and to the use of the said John Jones in fee simple in possession, in trust nevertheless for the said James Foster, George Jones, and John Barker, their heirs and assigns for ever, freed and discharged from the said debt of 1281*l.* 12*s.* 3*d.* and all interest due and to accrue due in respect thereof, and the said term of 1000 years was also thereby surrendered and merged in the said hereditaments as to so much thereof as related to the said hereditaments thereby conveyed.

By an indenture dated the 1st day of May, 1848, and made between Thomas Lane deceased of the first part, the defendant Maria Lane of the second part, the defendants John Elworthy Cutcliffe and Elizabeth his wife of the third part, and Reverend Anthony Boulton and Harriet his wife of the fourth part, and the said Anthony Boulton and the said defendant John Elworthy Cutcliffe of the fifth part, after reciting (among other things) the said indenture of mortgage of the 9th day of May, 1831, and the said indenture of the 29th September, 1847, for the considerations therein mentioned, Thomas Lane thereby granted, sold, and released unto Anthony Boulton and John Elworthy Cutcliffe, their heirs and assigns, all those two closes pieces or parcels of land hereinbefore described, and comprised in the said indenture of the 9th day of May, 1831, and not comprised in the said indenture of the 29th day of September, 1847, to hold the same unto Anthony Boulton and John Elworthy Cutcliffe, their heirs and assigns for ever, upon the trusts thereafter contained. Upon trust that they and the survivor of them or the heirs or assigns of such survivor should at any time thereafter, and from time to time, but on the direction of the said Thomas Lane during his life, demise or let the said hereditaments, or any part

thereof, for any term of years with or without premiums or yearly rent or otherwise as they or he should think fit, and either before or after granting such lease or leases, and subject thereto if granted, absolutely sell and dispose of the said closes pieces or parcels of land hereditaments and premises thereby released, or otherwise assured, or intended so to be, with their rights, &c., either by public auction or private contract, and in one or more lots, or as to them or him should seem reasonable, with liberty to buy in the same at any such sale, &c. &c., and for effectuating such sale or sales should enter into make and execute all such contracts, agreements, acts, deeds, conveyances, and assurances, as to the said Anthony Boulton and John Elworthy Cutcliffe, or the survivor of them or the heirs or assigns of such survivor, should seem necessary and proper. And it was thereby agreed and declared by and between the said parties thereto, that all sales, contracts, agreements, acts, deeds, conveyances, and assurances which should be entered into made and executed in pursuance of the said indenture now in recital, should be had entered into made and executed at the discretion and of the proper authority of the said defendants Anthony Boulton and John Elworthy Cutcliffe or the survivor of them, or the heirs or assigns of such survivor, and that the receipt or receipts of the said defendants Anthony Boulton and John Elworthy Cutcliffe or the survivor of them, or the heirs or assigns of such survivor, should effectually discharge the person or persons paying the same from being answerable for the misapplication or non-application of the purchase-monies. And it was thereby declared, that the said Anthony Boulton and John Elworthy Cutcliffe and the survivor of them, and the heirs and assigns of such survivor, should stand and be possessed of the monies arising from such sale or sales, and of the rents and profits of the said hereditaments in the meantime, upon trust in the first place to reimburse

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themselves respectively, all expenses attending the execution of the trusts thereby reposed in them, and then to pay interest after the rate of 5*l.* for every 100*l.* by the year on the sum of 827*l.* 8*s.* 11*d.* so due to the said defendant Maria Lane as therein mentioned, and on the sum of 718*l.* 7*s.* 9*d.* so in like manner due to the trustees of the said defendant Elizabeth Cutcliffe, by half-yearly payments on the days therein mentioned. And after payment of such interest, as aforesaid, to pay to the said Maria Lane or her assigns and also to the trustees for the time being of the marriage settlement of the said defendant Elizabeth Cutcliffe with William Dick deceased so that they might invest the same in the Bank of England or otherwise, as the trusts of the said settlement might require the said sums of 827*l.* 8*s.* 11*d.* and 718*l.* 7*s.* 9*d.* so respectively due to the said parties, as therein mentioned until the whole should be fully paid, yet in making payment of such principle or interest they should pay to the said parties and each should receive only in proportion to the debt or interest as aforesaid due to them respectively and so always from time to time without preference or priority in any manner howsoever. And upon further trust to pay to the said Anthony Boulton the sum of 461*l.* being the sum of 300*l.* therein mentioned and interest thereon at the rate therein mentioned, and to pay out of the surplus (if any) unto the said defendant Maria Lane and Anthony Boulton and their respective assigns the sums of 2200*l.* and 1500*l.* advanced by them respectively as therein mentioned unto the said Thomas Lane for the purposes of the estate of the said Joseph Lane, such two last mentioned payments to be also made rateably and without preference or priority. And in the said indenture was contained a release to Thomas Lane his heirs executors and administrators and also of the estate and effects of the said Joseph Lane deceased of all actions suits claims and demands which the said parties thereto

of the second third and fourth parts, or any or either of them, had against the said Thomas Lane, his heirs executors or administrators estate or effects or the estate or effects of the said Joseph Lane deceased for or by reason of the said several sums of 827*l.* 8*s.* 11*d.*, 718*l.* 7*s.* 9*d.*, 461*l.* 2200*l.*, and 1500*l.*, and interest on the same sums respectively or any part thereof as by the said indenture when produced will appear.

By an indenture, dated the 8th day of September, 1852, between the said Anthony Boulton and the said defendant John Elworthy Cutcliffe of the first part, the said Thomas Lane and Sydney Alleyne of the second part, the said Thomas Lane of the third part, and the Oxford, Worcester, and Wolverhampton Railway Company on the fourth part, one acre three roods and six and three quarter perches, part of the land composed in the mortgage of the 9th of May, 1851, were sold to the Oxford and Worcester Railway for 627*l.* 5*s.* 3*d.*, for the residue of the tenure, to the intent that the tenure might be merged in the freehold.

By an indenture, dated the 11th day of November, 1856, and made between the said Thomas Lane of the first part, the said Thomas Lane and Sydney Alleyne of the second part, and the plaintiff John Parker Bolding of the third part, after reciting the facts hereinbefore stated, and that the proceeds of the said two sales were paid to the said Thomas Lane and Sydney Alleyne, as they did thereby admit, that the principal money due on the security of the said indenture of the 9th day of May, 1831, had been thereby reduced, and there then remained due on account of such principal money the sum of 404*l.* 7*s.*; and there was also due on such security the sum of 302*l.* 15*s.* 10*d.* for arrears of interest, as the said Thomas Lane did thereby admit; and also reciting that the said plaintiff, John Parker Bolding, had agreed with the said Thomas Lane and Sydney Alleyne for the purchase of the said mortgage security of the 9th day

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of May, 1831, and all principal and interest monies then due thereon, at the price of *555l.* 14*s.* 11*d.* It was thereby witnessed that, in pursuance of the said agreement, and in consideration of the sum of *555l.* 14*s.* 11*d.* by the said plaintiff, John Parker Bolding, to the said Thomas Lane and Sydney Alleyne, paid at or before the execution thereof, they, the said Thomas Lane and Sydney Alleyne, thereby bargained, sold, assigned, transferred, and set over unto the said John Parker Bolding, his executors, administrators, and assigns, all that the said principal sum of 404*l.* 7*s.*, secured by the said recited indenture of the 9th of May, 1831, and all interest then due or to become due thereon, and the full benefit of the said recited securities and bond, and of all other securities for the same monies, and every part thereof. And all the estate and interest of them, the said Thomas Lane and Sydney Alleyne, therein. Together with full power for the said plaintiff, John Parker Bolding, his executors, administrators, and assigns, to sue for, and give receipts for the said monies and every part thereof in the names of the said Thomas Lane and Sydney Alleyne, or the survivor of them. To hold, receive, and take the said monies and premises unto the said John Parker Bolding, his executors, administrators, and assigns, absolutely. And it was also thereby witnessed that, in further pursuance of the said agreement, and for the considerations aforesaid, the said Thomas Lane and Sydney Alleyne did, and each of them did thereby assign, transfer, and set over unto the said plaintiff, John Parker Bolding, his executors, administrators, and assigns, all those two several closes, pieces, or parcels of land comprised in the indenture of the 9th May, 1831, except nevertheless, out of the assignment thereby made such portions of the said closes, pieces, or parcels of land as were thereinbefore and hereinbefore described to have been sold as aforesaid. To hold the said premises with their appurtenances unto the said plaintiff, John Parker

Bolding, his executors, administrators, and assigns, for the remainder of the said term of 1000 years, subject nevertheless to the equity of redemption subsisting therein under the hereinbefore recited indenture of the 9th day of May, 1831, and with the benefit of all powers therein contained as by the said indenture when produced will appear.

Thomas Lane died in the month of December, 1859, leaving the defendant Farindon Lane his heir at law; but having made a will with two codicils thereto some time previous to his decease, but in consequence of his estate being insolvent, which said will and codicils have not, nor has either of them ever been proved, and the said Thomas Lane has not any personal representative. The bill alleged that, except that Farindon Lane claimed an interest under the will if proved, he, plaintiff, did not know who were the parties interested.

The bill alleged the debts and sums of money already charged upon the said property, comprised in the said indenture of the 9th day of May, 1831, under that indenture and under the said trust deed of the 1st of May, 1848, exceeded by a very large sum of money the value of the said hereditaments, and that if necessary the said defendant Farindon Lane ought to be appointed to represent the estate of the said Thomas Lane deceased for the purposes of this suit.

Anthony Boulton died in May, 1854, having, by his will dated the 17th day of January, 1854, appointed Alfred Augustus Chapman and Antonia Maria his wife, and the defendant Samuel John Maclurcan and Mary his wife, his executors and executrixes. The will was duly proved by the defendant Samuel John Maclurcan alone, on the 10th of June, 1854, who was his sole legal personal representative. The sums of money so secured to Anthony Boulton by the indenture of the 1st day of May, 1848, as well as the sum of money secured to the defendant Maria Lane by the said indenture of the 1st day of May,

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1848, and the sums secured to the trustees of Elizabeth Cuctliffe under the deed of the 1st of May, 1848, were never paid.

Statement.

The bill was filed on the 24th July, 1861, by John Parker Bolding against Farindon Lane, the heir of the devisee, and also the executor of the mortgagor John Elworthy Cutliffe and Elizabeth his wife, the former a trustee, and both of them beneficiaries under the deed of the 1st of May, 1848; Maria Lane, another of the said beneficiaries; Samuel John Maclurcan, the representative of the other trustee, and also a beneficiary under the deed; and by amendment against Anna Dick and James Edward Jackson Riccard, persons claiming to be interested under the marriage-settlement of Elizabeth Cutcliffe, with her first husband, praying for an account, and "that the defendants, or some or one of them," might pay to the plaintiff the principal and interest due to him, and in default for foreclosure.

The defendants John Elworthy Cutcliffe and Elizabeth his wife, by their answer, submitted that no more than six years' arrears of interest could be recovered by the plaintiff against the estate.

The defendants also submitted that under certain circumstances (disclosed in a correspondence, which was set out in the pleadings) a sale of the property instead of a foreclosure ought to be directed.

The only question now to be decided was, whether the plaintiff was entitled to the whole amount of arrears, or only to six years' arrears of interest.

Argument.

Mr. *Malins* and Mr. *Robinson* for the plaintiff.

It is not disputed that a charge on land is within the meaning of the 42nd section; but the question is, whether the acknowledgment made in the deed of 1856 was not sufficient to take the case out of the statute? That must depend on what was the real question in the cause—

whether the acknowledgment must be by the second mortgagee. It was submitted that an acknowledgment by the mortgagor was sufficient within the meaning of the statute (*a*).

Mr. *Bacon* and Mr. *W. W. Karslake* for the defendants J. E. Cutcliffe and Elizabeth his wife.

A bill to foreclose is a proceeding to recover within

(*a*) The following are the sections relating to the question:— 3 & 4 Wm. 4, c. 27, s. 40: "No action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

Ib. section 42: "No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. Provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover, in such action or suit, the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

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the meaning of the 42nd section of the 3 & 4 Wm. 4, c. 27, and a mortgage is a charge within the meaning of the said provision: *Dearman* v. *Wyche* (*a*) and *Du Vigier* v. *Lee* (*b*).

It is well settled that a mortgagee as against the mortgagor cannot recover more than six years' arrears, *Elvy* v. *Norwood* (*c*), though there is a covenant for payment, *Shaw* v. *Johnson* (*d*). Where there is a trust for payment the case is different.

Where an annuity is charged on land as against the land only, six years' arrears can be recovered, having regard to the 42nd section, though under the 5th section of the 3 & 4 Wm. 4, c. 42, the grantor may be liable on his covenant for twenty years' arrears (*e*): *Hunter* v. *Nockolds* (*f*).

[The following cases were also cited:—*Hodges* v. *The Croydon Canal* (*g*), *Henry* v. *Smith* (*h*), *Lewis* v. *Dun-*

(*a*) 9 Sim. 570.
(*b*) 2 Hare, 326.
(*c*) 5 De G. & S. 240.
(*d*) 1 Drew. & S. 412.
(*e*) 3 & 4 Wm. 4, c. 42, s. 5. "Provided always, that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principle or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment, by writing or by part payment, or part satisfaction as aforesaid; or, in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability should have ceased, as aforesaid, or the party shall have returned beyond the seas, as the case may be, and the plaintiff or plaintiffs in any such action, or any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid in answer to a plea of this statute.
(*f*) 1 M. & G. 640; s. c. 1 H. & T. 644.
(*g*) 3 Beav. 86.
(*h*) 2 Dr. & W. 381.

combe (*a*), *Round* v. *Bell* (*b*), *Harrison* v. *Duignan* (*c*), and *Hughes* v. *Kelly* (*d*).]

Argument.

Mr. *Langworthy*, for the defendants, Maria Lane, S. J. Maclurcan, and Anna Dick.—Generally a charge cannot be held necessarily to include a mortgage; and, but for the proviso in section 42, it might be argued that mortgages were not within the section. In order, however, to give sense to the proviso, it must be taken that the previous part of the clause includes mortgages: *Hodges* v. *The Croydon Canal Company* (*e*), *Dearman* v. *Wyche* (*f*), *Elvy* v. *Norwood* (*g*), *Sinclair* v. *Jackson* (*h*).

Again: the mortgagor, having parted with his whole interest in the land (except a bare equity of redemption) to the defendants, could not by his acknowledgment renew the debt against the land, which was no longer his, although he might re-establish the liability against himself personally. The words, "by whom the same shall be payable," must be construed with reference to the ownership of the land. On this point *Hopkinson* v. *Rolt* (*i*) was an authority.

Mr. *Jackson* appeared for another defendant.

[His Honour mentioned the case of *Greenfell* v. *Girdlestone* (*j*).]

Judgment.

THE VICE-CHANCELLOR:—

The question in this case is, whether the plaintiff is entitled to an account of interest upon the mortgage for more than six years prior to the filing of his bill. It was

(*a*) 29 Beav. 175.
(*b*) 31 L. J. 127.
(*c*) 2 Dr. & W. 295.
(*d*) 3 Dr. & W. 482.
(*e*) 3 Beav. 86.
(*f*) 9 Sim. 570.
(*g*) 5 De G. & S. 240
(*h*) 17 Beav. 405.
(*i*) H. of L. not reported.
(*j*) 2 Y. & C. Eq. Ex. 662.

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argued for the defendants that by the mere force of the word "charge" in the 42nd section of the statute 3 & 4 Wm. 4, c. 27, mortgages are included. In support of this view the cases of *Dearman* v. *Wyche* and *Du Vigier* v. *Lee* were quoted. During the argument I endeavoured to point out the fallacy of the notion that a charge properly so called and a mortgage are synonymous. In Lord St. Leonards' most recent work (*a*), that great lawyer has discussed these two cases, and has very much shaken their authority. But he has also, by his elaborate examination of the statute, made it very clear (p. 139, sec. 51) that, although the word "charge" does not by its own force include mortgages (as was argued in this case), yet, as the 40th clause expressly mentions mortgages, they must be included in the 42d, from the necessity of construing the two clauses by reference to each other, and as interpreting each other. It was well observed by Mr. Langworthy during the argument that the express mention of mortgages in the proviso in the latter portion of the 42d clause makes it necessary to construe the whole clause so as to include them in the former part. It is, therefore, from the peremptory language of the Act of Parliament, as ascertained upon a critical examination of its clauses, so as to produce a harmonious construction, and not by treating the word "charge" as necessarily including mortgages, nor on the discredited authority of the two cases referred to, that it is necessary to hold that mortgages are included in the first part of the 42d clause of the Act.

It was contended for the plaintiff that by his deed of the 11th of November, 1856, there is an acknowledgement of the arrears due at that time, which entitles him to an account of the whole arrears from

(*a*) Practical Treatise on the New Statutes relating to Property, second edition, 1862.

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the date of his mortgage. This seems to be sufficiently established. An attempt was made to show that there was not a sufficient acknowledgment by the person by whom the interest was payable. This argument was grounded on the proposition that the second mortgagee, and not the mortgagor, was the person by whom the interest was payable under the usual form of the decree, as the decree would direct payment by the second mortgagee to the first. It is hardly necessary to say that there is no solid ground for such an argument. The terms of the contract, and not the decree, are what must govern the construction of the Act; and by the contract the mortgagor is the person by whom the interest is primarily payable, and by law compellable to pay it. There is, therefore, a sufficient acknowledgment to entitle the plaintiff to an account of the whole arrears of interest.

Re GROVE'S TRUSTS. TRUSTEE RELIEF ACTS.

May 9, 10.

A devise of real estate to trustees to pay the rents and profits to C. for a life, during widowhood,

JOHN GROVES, by his will, dated the 8th of April, 1825, devised to Henry Marlow and William Highway all his lands, hereditaments, and real estate in the parish

and after her decease or second marriage "to pay the rents and profits to all and every the child and children of his late sister, until the youngest of them should have attained twenty-one; and when and so soon as the youngest should have attained twenty-one, then on trust to sell the real estate, and to divide the monies equally between and among the said children, share and share alike.—*Held* that all the children were tenants in common until the youngest attained twenty-one.

Where a husband is unable to maintain his wife, and the fund is small, the Court will order the whole to be settled; but in a case where the husband was in good circumstances the Court directed one-half the fund to be settled on the wife.

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of Walsall, to hold unto the said H. Marlow and W. Highway, their heirs and assigns, upon trust to pay over the rents, issues, and profits thereof to his wife, Carew Groves, for her life, she continuing his widow; and from and after her decease or second marriage, then upon trust that his said trustees, or the survivor of them, should well and truly pay the rents, issues, and profits of his said real estates unto all and every the child and children of his late sister Maria Taylor, to and for their own use and benefit, until the youngest of them should have attained the full and complete age of twenty-one years; and when and so soon as the youngest of the children of his said sister should have attained that age, then upon trust that they, his said trustees, or the survivor of them, should sell and dispose of the said real estates, and should "pay, distribute, and divide the money to arise and which should be received from the sale thereof, unto and equally between and among the said children of the said Maria Taylor, share and share like." Testator also bequeathed his personal estate to his said trustees upon like trusts to convert the same and to pay the interest and proceeds to his said wife for her life, she continuing his widow; and after her decease or second marriage, upon trust to pay the interest of the said personal estate "unto all and every the child and children" of the said Maria Taylor, equally, share and share alike, "until the youngest of them should have attained the age of twenty-one years," and when and so soon as the youngest of them should have attained the age of twenty-one, then upon trust to pay and distribute the money to arise from the said personal estate unto and equally between the said children of the said Maria Taylor, share and share alike. Testator appointed his said wife and the said Henry Marlow and William Highway executrix and executors of his said will.

The executors of Mrs. Douker, a mortgagee of two

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shares, now presented this petition praying for the sale and for the distribution of a sum of money which the trustees had paid into Court and invested. The petition also prayed for payment of the mortgage debt.

The will was proved by testator's widow and Henry Marlow, the other executor, on the 15th September, 1825.

The widow died on the 5th of February, 1861, without being married again.

There were only four children of the said Maria Taylor living at the death of the testator John Groves, viz., Thomas Taylor, who was born in April, 1817; James Taylor, who was born in March, 1821; Maria Taylor, who was born in August, 1822; and Caroline Taylor, who was born in December, 1823.

Caroline Taylor died in 1830 under twenty-one. James Taylor died in 1852, a bachelor and intestate, leaving John Taylor (his father) him surviving, who also took out administration to his son James Taylor's estate. Maria Taylor, in the year 1843, became the wife of Philip Grove.

On the 4th of September, 1844, Thomas Taylor mortgaged his "part or share, or any other part or share to which he then was or might become entitled, in the moneys to be received from the real and personal estate bequeathed by the said John Groves" to one Charles Marklow for 200*l.* This mortgage, it was alleged, had been paid off. On the 9th of July, 1851, Thomas Taylor mortgaged all his said share and interest in the said real and personal estate to E. T. P. Buddicom for 300*l.* and interest; and on the 14th of March, 1854, Thomas Taylor made a second mortgage of his said share to Jane Dowker, widow, to secure 200*l.* and interest. On the 23rd of June, 1859, Thomas Taylor's share was assigned to John Smith, by way of sale, under a power in Buddicom's mortgage-deed, discharged from the said sum of

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300*l.* and interest. Mrs. Dowker's mortgage was secured by the covenant of Thomas Taylor, and by a collateral policy of life assurance.

By an indenture dated the 14th of January, 1850, Philip Grove and Maria his wife mortgaged the share of the said Maria Grove in the real and personal estate of the testator to the said Jane Dowker, to secure 270*l.* and interest. On the 18th of June, 1858, Philip Grove and Maria his wife made a second mortgage of Maria Grove's said share to Mary Elizabeth Griffiths, to secure a further sum and interest.

On the 29th of October, 1860, John Taylor mortgaged all his share and interest, whether as heir-at-law, administrator, and only next of kin of or to his said son James Taylor, or otherwise, to Charles Allen Green; and on the 3rd of December, 1860, he further mortgaged the same to Samuel Stephens and Samuel Wilkinson the younger. Green's mortgage was, on the 3rd of September, 1861, assigned to Henry Duignan.

Mrs. Dowker died on the 2nd of February, 1857, having by will appointed the Rev. J. S. Middleton and T. M. Kendall her executors.

John Taylor died in October, 1861, having by will appointed the said Thomas Taylor, and also John Taylor and Caroline Taylor, spinster, his executor and executrix.

The trustees paid a portion of the fund into Court.

Argument.

Mr. *Malins* and Mr. *Lonsdale,* for the petitioners.—Upon the true construction of this will no child of Maria Taylor who died under twenty-one became entitled. In *Leeming* v. *Sherratt* (*a*), where the language was similar, Vice-Chancellor Wigram held that no child who did not attain twenty-one was intended to take.

(*a*) 2 Hare, 14.

In *Parker* v. *Sowerby* (*a*), where the words were "until my nephews and nieces attain twenty-one, and after the youngest of my nephews and nieces are of age, then the estates to be sold and the produce to go among (excepting two) all my nephews and nieces," it was held that the gift vested only in those who attained twenty-one.

In *Lloyd* v. *Lloyd* (*b*), where the words were almost identical with those contained in this will, Vice-Chancellor Wood held that one of several children who survived the testator, but died under twenty-one, was not entitled. It was submitted, therefore, that the fund was divisible in thirds.

[The VICE-CHANCELLOR observed that in that case the words were "such children;" the words "dying under twenty-one" did not occur in the will.]

Mr. *Craig* and Mr. *Shebbeare* for the second mortgagee of Mrs. Grove. The effect of these words is to create a joint tenancy in the shares; and, therefore, on the death of Caroline Taylor her interest passed to her brothers and sister, and in like manner on James Taylor's death his interest passed to his brother and sister; and if that were the correct view, the fund was divisible in moieties.

If the Court should hold otherwise, it was submitted that, at all events, the fund was divisible in thirds.

Mr. *Greene* and Mr. *Fischer* for Mrs. Grove, and Mr. *John Pearson* for Thomas Taylor, supported the same view.

Mr. *Osborne Morgan*, for the children of John Taylor, submitted that there was no gift except in the direction to pay. He also took a distinction between legacies

(*a*) 1 Drew, 488; s. c. 4 De G. M. & G. 321. (*b*) 3 K. & J. 20.

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payable out of the personal estate, and those payable out of the realty.

Argument.

Mr. *A. Smith* appeared for the executors of Taylor's will, who had been ordered to represent the deceased children.

Mr. *Bird* and Mr *Beg* appeared for parties in the same interest. They contended that there was no joint tenancy, but that the clear intention of the testator was that all the children should participate in the gift.

In *Cooper* v. *Cooper*(*a*), the testator gave the rents towards the maintenance of his children until the youngest attained twenty-one, and then on trust to sell and divide the proceeds in proportion among the children nominated; and it was held that the share of each child who died under twenty-one was vested.

Judgment.

THE VICE-CHANCELLOR:—

The testator has, in clear language, made "all and every the child and children" of the person in question the objects of his bounty. He uses the expression "all and every the child and children" as to the rents of the real estate, and "all and every the child and children" as to the interest and dividends of his personal estate. "All and every" are to have the rents of the real estate, and the interest of the personal estate, until the youngest of them shall have attained twenty-one. It has been argued that, as to the real estate, a joint tenancy in the rents has been created by the words "all and every the child and children," and that the direction to pay them the rents and profits of the real estate until the youngest child shall have attained twenty-one constitutes a gift to them, in a class, as joint tenants. No authority has been

(*a*) 29 Beav. 229.

cited for this, and I am of opinion that, as to the rents of the realty and the interest of the personalty, there is no joint tenancy, but a tenancy in common to all and every of the children until the youngest attains twenty-one. The language in the case of *Lloyd* v. *Lloyd* excluded all children who did not attain twenty-one. But in the present case there is nothing to show that the rights and interests of the children who do not attain twenty-one are excluded. When the testator has said that the objects of his bounty, as to the interest of the capital, are "all and every the child and children," *primâ facie* until some words as clear as "all and every" can be found to exclude some child or children the Court is bound to give effect to those words.

Another argument is raised on the direction "to divide the fund" when and so soon as the youngest of "them shall have attained twenty-one." But it is clear that the word "them" refers to "all and every the child and children," and the direction is merely as to the time when the division is to take place. But it has been said that there are no words of gift here except the words "pay and apply." That argument was used, I suppose, to introduce the doctrine of the cases of *Gaskell* v. *Harman*(*a*), and *Leake* v. *Robinson*(*b*); but how can the principle of those cases have the least application where the testator has said that a certain specified property is to be divided among "all and every" the child and children of a certain person? If the distribution is to take place among these persons at a fixed time, and the interest is to be enjoyed by them in the meantime, unless you can find definite words to cut down the words of gift the principle of *Gaskell* v. *Harman* and *Leake* v. *Robinson* has no application whatever; for the whole trust is a

(*a*) 6 Ves. 159; 11 Ves. 489. (*b*) 2 Mer. 363.

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continuous application of the interest among a certain class of persons, the whole of whom are to have the capital divided amongst them. There must be a declaration that the fund is divisible in fourths.

A petition then was heard on the part of Mrs. Grove, praying that her share in the trust fund might be settled in the usual way.

The petitioner stated that she had had five children, three of whom were living; that no settlement was made on her at her marriage or since; that her husband had followed various callings, and for two years past had been dependent upon his wages from occasional employment as a journeyman painter; that only one of the children was earning anything; that a sum of 150*l.* belonging to the petitioner at her marriage had been unsuccessfully spent by her husband in the attempt to establish a business; and that in 1850 her husband compounded with his creditors, and on that occasion the 270*l.* was borrowed from Mrs. Dowker on mortgage. Also that in 1853 petitioner's father, James Taylor, conveyed to her brother Thomas Taylor, as trustee for her, a piece of freehold land with a public-house. This property was charged with a debt of 300*l.* already subsisting, and the petitioner afterwards borrowed a further sum of 400*l.* on the security, with which she built eight houses on the property. She afterwards borrowed 100*l.* on the security of the land and houses, and as a collateral security for the repayment of the 800*l.* the mortgage had been executed to Mary E. Griffithes, who for the last two years had been in possession. The amount of the whole fund in court was 2325*l.* 19*s.* Three per Cent. Annuities.

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Mr. *Greene* and Mr. *Fischer* now asked that the whole fund might be settled, and cited *Kincaid's Trusts* (*a*).

The VICE-CHANCELLOR said, that when the husband was wholly unable to maintain his wife and the fund was small the Court would settle the whole fund; but where, as in this instance, the husband was by no means wholly unable to support his wife, it was usual to settle only half of the fund, whatever it might be.

Ordered that half the share of Mary Grove be settled.

DUMPER *v.* DUMPER.

April 26th, 28th. May 5th.

THE bill in this cause was filed originally on the 21st December, 1860, and afterwards amended. It stated that on the 11th February, 1859, the plaintiff, William Vine Dumper, lent and advanced to one William Henry Duffett, of Portsea, 800*l.* at 5 per cent. interest, upon mortgage of a piece of land situate near Lake Lane, in the parish of Portsea. That the 800*l.* was paid to Duffett by the plaintiff out of his own proper monies; but at the plaintiff's request the mortgage was made out

Where a father advanced money on mortgage of real estate, and contrary to his solicitor's advice, without his son's knowledge, took the conveyance in his son's name, and subsequently told him it was a gift, but reserving the interest for the father's life, and added "There are your deeds," which the son ultimately took and retained,—on a bill by the father against the son, the Court declared that the transaction was not an advancement, but made the father pay the costs of the suit.

To rebut the presumption of advancement there must be evidence of facts contemporaneous with the act in question.

(*a*) 1 Drew. 320.

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and taken in the name of his son, the defendant Alfred Dumper, as a trustee for the plaintiff. That the mortgage transaction was completed on behalf of both parties by Mr. William George, solicitor. Duffett afterwards sold the equity of redemption in the mortgaged premises to the defendant James Jones, and conveyed the same to him by an indenture dated 11th November, 1859. The interest on the mortgage debt had been paid quarterly; such interest up to November, 1859, was paid by Duffett to the plaintiff; and since that time up to the 11th of November, 1860 by the defendant Jones to the plaintiff, That the deeds and securities were kept by the plaintiff in his house at Southampton, until the 15th November, 1860, when the same were taken from the plaintiff's house without his knowledge, and were at the date of the filing of the bill in the possession of the defendant Alfred Dumper. The deeds and securities had since been deposited with the clerk of records and writs. The bill charged that Alfred Dumper was a trustee for the plaintiff, but that he nevertheless intended to dispose of the mortgage and securities, and to receive the 800*l.* for his own use and ought to be restrained for so doing. The bill further charged that the defendant A. Dumper had given notice to the defendant Jones to pay the interest to him; also that the defendant A. Dumper alleged that the plaintiff was aged and infirm, and that the mortgage deeds relating to the 800*l.* were not safe in his custody. The plaintiff alleged that he was of perfectly sound mind, and in good bodily health, and capable of managing his affairs.

The bill prayed for a declaration that the defendant Alfred Dumper was the trustee of the sum of 800*l.* and the securities, and that the said defendant Alfred Dumper might be restrained by injunction from assigning the debt and securities to any other person than the plaintiff, or as he should direct; and to restrain the defendant Jones from paying the debt and interest, or any part thereof, to the defendant Alfred Dumper.

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The defendant Alfred Dumper, by his answer, said said that his father was upwards of eighty-five, and was very infirm. In March or April, 1859, his father sent for him from Gosport to Stubbington, Hants, where the father was then residing, and defendant went accordingly. Defendant said, "My father then told me that he had advanced 800*l.* upon mortgage to Duffett in my name, which he stated was for a gift to me from him, but that the interest on the said sum of 800*l.* must be paid to him, my father, for his life. My father told me that he had so given the said sum of 800*l.* to me during his lifetime to save the duty which would have otherwise been payable in respect of it after his death; and he on that occasion produced to me certain deeds, which he stated to me, and I believe, were the said mortgage for the said sum of 800*l.*, and the deeds relating to it, and said, 'There are your deeds;' and I took possession of them, but returned them to him, and left them under his care." The defendant swore that from this statement he believed the transaction was entered into for the purpose of making a gift or advancement to him, or for his benefit. He said further, that in October, 1860, his father requested him and his wife to leave London and to go down to Southampton to take care of him. The defendant consented to do so; but, as he could not immediately leave his employment, he sent down his wife at once, and in about three weeks joined her. The defendant said: "Whilst so living with my father, and on or about the 12th November, I took possession of the mortgage deeds, which, from the plaintiff's statement to me, as aforesaid, I considered my own property, and I did so because I considered that from my father's age and infirmities they were not safe in his custody, and without the slightest intention of depriving him of the interest of the said mortgage-debt during his life, or otherwise dealing improperly with them; and I have

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since deposited the said deeds with the proper officer of the Court." The defendant further said, "Being advised that the legal effect of the plaintiff's taking the said mortgage in my name, under the circumstances aforesaid, is in accordance with his said intention to entitle me to the said principal sum as an advancement to me in life, I do in fact claim to hold the said mortgage-deed and other deeds and securities, to receive the sum of 800*l.* as my property; but I deny that I claim to receive the interest to accrue thereon during the life o the said plaintiff as my property; but I am ready to pay the same to, or secure the same to be received by him."

The plaintiff, by his affidavit, said he did not give the deeds to the defendant, or give up or part with the possession thereof either to him or any other person; but he did tell the defendant, in the presence of Mr. William Dark, that he should give the defendant the deeds at his death if he should be in the same mind then as he was at that time. On the 15th (*a*) November, 1860, after a short absence from his room, he found that his desk had during his absence been unlocked, and a box containing the deeds and securities removed without his knowledge or consent. He had examined the deeds himself on the morning of the 15th.

Mr. William Dark said he was present with the plaintiff and defendant when, to the best of his recollection, the plaintiff informed the defendant that he intended to give him the deeds at his death if he should be in the same mind then as he was at that time; and that in such case he (the defendant Alfred Dumper), would have nothing more to do after his, the plaintiff's, death, but to take them, as he, the defendant Alfred Dumper (with him the said deponent and Mr. Deacon), was one of the executors of the plaintiff's then last will

(*a*) There appears to be an error in the date.

The defendant Alfred Dumper deposed to the statement first above mentioned in his answer, and said his father asked him if he was satisfied, and on his saying he was quite satisfied, his father said, "You had better make your will, and give it to your wife for life; and, if you have no children, I should like it to come back into our family." Defendant took the deeds, but returned them to his father, and left them under his care. He denied Mr. Dark's statement, that his father said he would give him the deeds at his death if he should be in the same mind then as he was at present. The defendant possessed himself of the deeds on the 15th November, 1860, by taking them from his father's sitting-room when they were lying on the table.

Mr. George, the solicitor of the defendant Jones, said that he was concerned for Mr. W. H. Duffett in the mortgage transaction, and also for the plaintiff. In accordance with instructions given about the 27th of January, 1859, he prepared the deed, causing it to be engrossed with the Christian name in blank, and when the plaintiff attended to complete, and on his informing deponent that the money was his property, deponent advised the plaintiff to have the deed prepared in his own name, but plaintiff informed deponent that his son did not know anything about it, and that he did not wish him to know anything about it. The christian name Alfred was filled in at the time of the completion by the plaintiff's direction, he alleging at the time "that if he did not alter his mind previously to his death he might give it to his said son." Deponent said that from the conversation he then had he believed it was not the plaintiff's intention to make a gift to his son of the money advanced on the mortgage, and that at the time the plaintiff had a strong impression that he could at any time dispose of the money.

Mr. *Malins* and Mr. *Shebbeare*, for the plaintiff, sub-

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mitted that the evidence here clearly proved that no advancement was intended. There was the contemporaneous evidence of the solicitor, that the plaintiff intended no advancement, but simply attempted to avoid legacy duty in case of his death. Then, coupled with that was the fact, that the father had received the interest down to the time that the son against his will and improperly possessed himself of the title deeds. This case differed from those in the books, inasmuch as here it was the common case of both parties that the father reserved an interest inconsistent with the alleged advancement.

In *Devoy* v. *Devoy* (*a*) the Court held the evidence of the father, as to the intention, sufficient to rebut the presumed advancement; but here there was in addition the evidence of the solicitor of the plaintiff, and the qualification of the legal effect of the transaction. It was submitted, therefore, that the plaintiff was entitled to the relief sought by the bill.

Mr. *Briggs* appeared for the mortgagee, and submitted to act as the Court should direct. He asked that his costs might be provided for.

The VICE-CHANCELLOR referred to the case of *Dyer* v. *Dyer* (*b*) as showing that the effect of the father's act must depend on the evidence.

Mr. *Cracknall* for the defendant.—The rule mentioned in *Dyer* v. *Dyer* is not the right rule, and has never been followed. In *Grey* v. *Grey* (*c*) the rule was laid down correctly that a purchase by a father in the name of his son was an advancement. In *Finch* v. *Finch* (*d*) Lord

(*a*) 3 S. & G. 403.
(*b*) 2 Cox. 92.
(*c*) Rep. temp. Finch, 338, and 2 Swanst. 594.
(*d*) 15 Ves. 43.

Eldon held that a purchase by a parent in a child's name was an advancement not to be rebutted by slight circumstances. In *Murless* v. *Franklin* (*a*) the same doctrine was laid down with this further principle, that not only must there be clear evidence of the intention to rebut the presumption, but that evidence must be of facts contemporaneous with the act. In that case the purchase was of copyhold. In *Crabb* v. *Crabb* (*b*), where the father purchased stock in the name of his son and a stranger, and directed the banker to credit the dividends to his son, it was held to be an advancement; and a codicil to the father's will, dated two years after, was held inadmissible to qualify it. [The VICE-CHANCELLOR.—Can you refer me to any case in which, where the son admitted he was not to take according to the terms of the conveyance, it was held an advancement?] In *Mumma* v. *Mumma* (*c*) the father received the rents during his life though the purchase was made in his son's name. Suppose the father had died before question raised, it is clear the son would have been entitled. In *Sidmouth* v. *Sidmouth* (*d*), where the father purchased stock in the son's name, it was held that subsequent acts and declarations of the father were inadmissible as evidence of intention. In *Christy* v. *Courtenay* (*e*), *Skeats* v. *Skeats* (*f*), *Jeans* v. *Cook* (*g*), *Ebrand* v. *Dancer* (*h*), the same principle was laid down. In a case lately before this branch of the Court, *Devoy* v. *Devoy* (*i*), it was held that the father's subsequent declaration was admissible; but there the fund was standing in the joint names of the father, the wife, and the child. [*Taylor* v. *Taylor* (*j*). was also cited.]

Mr. *Shebbeare* in reply relied on the principle laid

(*a*) 1 Swanst. 13.
(*b*) 1 M. & K. 511.
(*c*) 2 Vern. 19.
(*d*) 2 Beav. 447.
(*e*) 13 Beav. 56.
(*f*) 2 Y. & C. C. C. 5.
(*g*) 24 Beav. 513.
(*h*) 2 Cases in Ch. 26.
(*i*) 3 Sma. & G. 403.
(*j*) 1 Att. 386.

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down in *Devoy* v. *Devoy*. He cited also *Bone* v. *Pollard* to show that so long as the right to the fund was subject to qualification it remained the property of the person who had advanced it (*a*).

Mr. *Cracknall* replied on that case.

Judgment.

THE VICE-CHANCELLOR:—

The mortgage in this case having been taken by the father in the name of his son, it must be presumed that it was intended to be an absolute advancement or gift to the son unless the evidence shows a contrary intention at the time of the transaction. It is well established that in cases of this kind, the evidence which is properly receivable to rebut or to support the presumption of advancement, must be of facts antecedent to, or contemporaneous with, the transaction; or so immediately after as to constitute a part of the same affair.

In the present case, the father and the solicitor who prepared the mortgage-deed prove the nature of the transaction, the explanations given at the time of the transaction, and the circumstances under which the name of the son was used. Their evidence seems sufficiently to rebut the presumption of advancement. As to the father's evidence, although it is clearly admissible in this case, as in the case of *Devoy* v. *Devoy*, it must be in every such case liable to observations which tend to diminish its weight. But the solicitor distinctly states, that from the conversations he had with the plaintiff on the occasion when the son's name was inserted, and when the deed was executed, he verily believes it was not the intention of the plaintiff to make a gift to his son of the mortgage-money, or any part of it. He proves that, having ascertained that it was not the intention of the plaintiff to use the son's name for the

(*a*) 24 Beav. 283.

purpose of making an advancement or gift, he advised the plaintiff to have the deed prepared in his own name, and not in the name of the defendant, his son. The substance of the solicitor's evidence is, that the plaintiff, rejecting his advice, executed the deed, as he believes from his expressions, under a strong impression that he could at any time dispose of the money and require the deed to be altered from the name of his son into his own proper name. This is confirmed by the evidence of Duffett, the mortgagor. But the plaintiff himself states, and these two other witnesses concur in stating, that the plaintiff said that, unless he should change his mind, he should give the deeds and the money to his son at his death. According to this evidence, the testator's intention was not to benefit the son by any present advancement and gift in his lifetime, but to give it to the son at his death.

The evidence of the son proves no fact contemporaneous with the transaction; he proves a declaration long subsequently by the father that the mortgage was taken in the son's name as a gift to him, but that the interest must be paid to the plaintiff for his life, and that he had given it during his life to save the duty. Even if this subsequent declaration of the son were properly admissible as evidence, it introduces a qualification which rebuts the presumption of advancement, for, if the intention of the father was to reserve a beneficial interest in the mortgage for himself, and his intention was to save the legacy duty, the effect of the deed as an absolute gift or advancement is reduced. In cases of this kind a declaration of an intention at the time to reserve a life-interest or any other beneficial interest, has a very different effect from the mere subsequent receipt of the rents by the father without any evidence of his intention, at the time of the transaction, to reserve his right to the rents, or to any other beneficial interest in what purports, on the face of the deed, to be the absolute and present property of the son.

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The case of *Grey* v. *Grey*, as decided by Lord Nottingham, has been questioned; but it ought to be observed that in that case there was no evidence at all of anything contemporaneous with the transaction to show that the father had any view or intention of reserving a right to the rents during his life, or that he had any intention of qualifying the absolute right purported to be given to the son. There seems to be in this case evidence sufficient to rebut the presumption of advancement.

But, as the plaintiff's conduct, in wilfully disregarding the advice of his solicitor, has occasioned this suit, he must pay the costs of both the defendants.

Declare that, it appearing from the evidence that the mortgage in question was taken by the plaintiff in the name of the defendant, his son, without the intention of advancement, or of giving to the son any present interest, the Court doth order and decree that the defendant, the son, do execute a proper deed of assignment or transfer of the said mortgage to the plaintiff, or such person as he shall direct; such deed to be prepared at the cost of the plaintiff, and to be settled in chambers, in case the parties differ. Liberty to apply.

April 29th, 30th. May 5th.

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Where a testator in advanced years and ill health induced his niece to reside with him as his housekeeper on the verbal representation that he would leave her certain property by his will, which he accordingly caused to be prepared and executed, but subsequently by a codicil revoked, the Court directed the trusts of the will to be performed.

A gift made by a revocable instrument in pursuance of a verbal representation whereby the donee is influenced, and on the faith of which he confers a benefit on the donor, becomes irrevocable. Observations on the case of *Jorden* v. *Money* (*a*) as inconsistent with the decision of the House of Lords in *Hammersley* v. *De Biel* (*b*).

THIS bill was filed by Fanny Loffus, widow, praying, first, that it might be declared that the plaintiff was

(*a*) 5 H. L. C. 185 (*b*) 12 Cl. & Fin. 45.

entitled to enjoy two dwelling-houses according to the trusts of a codicil to the testator's will, &c. The bill prayed, secondly, that a codicil to the testator's will, so far as it revoked the same, might be declared fraudulent and void; and thirdly, in the alternative, that it might be declared that the plaintiff was entitled out of the estate of the testator to be paid proper remuneration for her services, and trouble and time, &c., during the testator's life, and might be declared a simple contract creditor for the same.

The bill stated the plaintiff's case as follows:—

In the month of March, 1853, the plaintiff, who was residing at Laceby, in the county of Lincoln, was, by the death of her husband James Loffus on the 4th day of such month, left at the age of twenty-nine a widow with one young child and no means of support, except her own exertions as a laundress, by which she earned from 10*s.* to 15*s.* weekly, being then strong and in good health; and the plaintiff's uncle Benjamin Gunnell, who was then an old gentleman of about seventy, living at the town of Hull, in the county of the same town, and possessed of considerable property, having on the 11th of such month of March lost his wife, wrote to the plaintiff requesting her to come and keep his house, and accordingly, as she was obliged to work for her livelihood, she went and kept her said uncle's house at Hull.

About three weeks after she went there her child died, and the said Benjamin Gunnell shortly afterwards promised to give her for taking care of him and his house the sum of six guineas a year by quarterly payments as pocket-money, and all proper food, clothing, and other necessaries, and to leave her something considerable at his decease.

The plaintiff accordingly remained with her said uncle, and duly attended to him and his house, and received the

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six quarterly payments of her pocket-money, which became payable in and previously to September, 1854.

The said Benjamin Gunnell, though old when the plaintiff first went to him as aforesaid, was not very ill, but he gradually became so and became afflicted with a very sad and serious disease, which became much worse in or about the said month of September, and from this time up to the time of his death he was greatly afflicted with such disease, and with much infirmity of body (but not of mind), which rendered it necessary that he should nearly constantly (both day and night) have some one attending upon him, and he kept only a little girl as servant.

The plaintiff having in the said month of September discovered that her uncle had only left her a legacy of 10*l.* by his will, and that the attention which he required both day and night in consequence of the disease and infirmity under which he laboured was so constant, troublesome, and great that it was affecting her health, she informed her uncle thereof, and that if he did not properly provide for her she should leave.

The said Benjamin Gunnell thereupon earnestly entreated her to remain, as he had no one else who would take care of him in his infirm and diseased state, and promised that if she would he would provide for her after his decease by leaving her for life the rents and profits of the houses Nos. 3 and 6, in Prospect Street, Hull, which belonged to him; and the plaintiff having been prevailed upon to agree to stay upon such terms, it was finally, and in or about the month of September, arranged and agreed between the plaintiff and the said Benjamin Gunnell that he the said Benjamin Gunnell would, in consideration of the plaintiff remaining with and taking care of him and his house until his death, leave the plaintiff upon his decease the rents and profits of such two houses for her life, and would do whatever

was necessary for leaving and securing the same to the plaintiff as aforesaid. These houses belonged to the said Benjamin Gunnell in fee simple in possession.

Accordingly, upon the faith and in trust and confidence that he would do so, the plaintiff remained and continued with the said Benjamin Gunnell, and duly and carefully attended to him and his house.

The plaintiff repeatedly requested the said Benjamin Gunnell to do what was necessary to carry out the said arrangement and agreement, and he thereupon always promised to do so; but, as time passed, and the said Benjamin Gunnell neglected so to do, the plaintiff frequently insisted that the said arrangement and agreement must be carried out by the said Benjamin Gunnell or she should certainly leave, and accordingly she, on two or more occasions, packed up her things and prepared to leave; but, he having repeated his promises, she was induced to remain; and, after the plaintiff had continually threatened and prepared to leave, and the said Benjamin Gunnell had promised to perform the agreement on his part, he went to his solicitor, Mr. Atkinson of Hull, and directed him to draw out a document for leaving, and securing to the the plaintiff after his decease a life interest in the said houses, determinable, however, as to one of such houses on her marrying without the consent of the trustees.

The plaintiff, finding that the promised document had not been executed by the said Benjamin Gunnell, repeatedly requested and insisted on his executing the same; and finally, after considerable delay, and shortly after the 30th day of March, 1855, the said Benjamin Gunnell informed the plaintiff that he had executed a proper document at his said solicitor's, and requested her to attend at such his solicitor's, where she accordingly attended; and the said Mr. Atkinson did, by the direction and in the presence of the said Benjamin Gunnell, then and there read over to the plaintiff a certain document whereby the

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said Benjamin Gunnell declared that his trustees or trustee, for the time being, of his will should stand possessed of the said dwellinghouses numbered 3 and 6 in Prospect Street, in the borough of Kingston-upon-Hull, upon trust as to the said dwellinghouse numbered 6 as aforesaid to allow the plaintiff to receive the rents thereof for her life for her separate use, and as to the said dwelling-house numbered 3 as aforesaid to allow the plaintiff to receive the rents and profits thereof until she marry without the consent of the trustees or trustee for the time being of the said Benjamin Gunnell's will, or until the plaintiff's death (whichever event might first happen). Provided always that the said two dwellinghouses should respectively be kept in good and thorough repair by the plaintiff during her life. And the said Mr. Atkinson did then in the plaintiff's presence read and explain such document, and the plaintiff at first objected to the provisions concerning her marriage, but finally agreed to it. And the said Benjamin Gunnell did then inform the plaintiff that she was by such document provided for as Mr. Atkinson had read from the document, and was thereby made perfectly secure; and the plaintiff was also told by the said Mr. Atkinson, in the presence of the said Benjamin Gunnell, that such document was duly executed by the said Benjamin Gunnell, and would legally and properly secure to her the aforesaid rights and interests in the said houses; and the said Benjamin Gunnell having repeated that she was now perfectly secure, she, having no person to advise her, relied upon the said Benjamin Gunnell and such solicitor, and in perfect trust and confidence that they would not deceive her, but that she was made quite secure of the aforesaid provision, and would, upon the decease of the said Benjamin Gunnell, certainly have and enjoy such rights and interests in the said houses as aforesaid, returned to the residence of the said Benjamin Gunnell,

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and from that time up to the time of his death paid the greatest care and attention to the said Benjamin Gunnell and his house; and he having, in consequence of his said diseased and infirm state, required great attention both by night and day, she thereby greatly over-exerted her strength and materially injured her health, trusting and relying that she would by such provision as aforesaid ultimately have the means of livelihood without the necessity of working for the same.

From the time of the execution of the said document up to the time of the decease of the said Benjamin Gunnell he had only one girl as a servant, and consequently the plaintiff had not only to attend upon the said Benjamin Gunnell as aforesaid, but also to attend to and herself perform the greatest part of the household duties of a servant, and also to cook the food.

The said Benjamin Gunnell departed this life on the 28th day of March, 1858, leaving the defendant William Anderson Gunnell, his only son and heir-at-law, him surviving; and the plaintiff did, after his, the said Benjamin Gunnell's decease, attend to the household duties attendant on his death and funeral.

The plaintiff finds that the will of the said Benjamin Gunnell bears date the 19th May, 1854, and thereby the testator, after bequeathing certain legacies therein mentioned, bequeaths the plaintiff 10*l.*, and, amongst other things, devises his dwelling-houses, 2, 3, and 5 (afterwards numbered 3, 4, and 6) in Prospect Street aforesaid, with the appurtenances, with the residue of his real estate, to the use of his trustees, their heirs and assigns, upon trust to permit and allow his son, the defendant William Anderson Gunnell, to receive the rents and profits thereof for his life, and immediately after his decease upon trust to sell the same and stand possessed of the proceeds, upon trust to pay and divide the same unto and between such grandchildren of the testator's

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(whether grandsons or granddaughters) as shall be living at the time of such sale as tenants in common, equally and absolutely, the shares of such grandchildren as might be females for their separate use; and he appointed William Cousens and the defendant Edward Maw trustees and executors of his will; and the said testator, by a codicil dated the same day, empowered his trustees, if any of his granddaughters, Mary Jane Gunnell, Alexandrina Victoria Gunnell, and Sarah Morton Gunnell, should cease to reside with their father, to pay to them during their father's lifetime, out of the rents of his real estate, an annuity of 15*l.* a year.

The said Benjamin Gunnell did, by a second codcil dated the 30th March, 1855, after partially reciting his will, and that his houses in prospect Place were then numbered 3, 4, and 6, revoke the trust in his said will of the dwelling-houses numbered 2 and 5 (then 3 and 6) in Prospect Street aforesaid, in favour of his said son, and instead and place thereof he declared to the effect hereinbefore stated in the 9th paragraph hereof, and that after the determination of the interest given the plaintiff, the said dwelling-houses should be upon trust for his said son for life, and after his decease upon the same trusts as declared by his said will, and appointed George Tune trustee and executor in the place of the said William Cousens.

The bill proceeded to allege that the plaintiff had discovered that by his will, dated in 1854, the testator had given the houses in question to trustees in trust for sale, with direction to sell the same, and pay the interest and ultimately the proceeds among persons named in the will.

The bill alleged that on the 12th of March, 1858, by another codicil to his will, the testator made void all gifts contained in his will or codicil in favour of the plaintiff, and directed that his will and codicil should be read as if her name and any directions for her benefit were wholly

expunged from the said will, which in all other respects he confirmed.

The plaintiff finds that the said alleged third codicil was executed only sixteen days before the testator's decease, when he was very ill and infirm, and the plaintiff believes that the said Benjamin Gunnell would not, after her great and daily exertions for his care and comfort and great attention towards him, have attempted to deprive her of the provision he had made for her unless he had, while so ill and infirm, been improperly prejudiced against her, and wrongly and unduly influenced by his son the defendant William Anderson Gunnell, or some other person unknown to the plaintiff, to revoke the said second codicil; and such revocation was obtained by fraud, and ought not in equity to be allowed to operate to deprive the plaintiff of such rights or interests as aforesaid.

The plaintiff has in all things performed her part of the aforesaid agreements with the said Benjamin Gunnell, and is in consequence entitled to have the full benefit of the aforesaid agreements of the said Benjamin Gunnell, and to have the same duly performed by the persons claiming under his will and codicils.

The plaintiff submits that, in case this Honourable Court shall be of opinion that she is not entitled to such relief as aforesaid, then that she is entitled to receive from and to be paid out of the estate of the said Benjamin Gunnell proper remuneration or wages for the time, trouble, and attention she did as aforesaid, during the lifetime of the said Benjamin Gunnell, expend upon and pay to him, and after his decease expend and pay in and about his decease and funeral; and that she is for the amount thereof a simple contract creditor against his estate and representatives, and ought to be paid the same in a due course of administration.

The bill alleged that the will, with the three codicils, was duly proved by one executor, that repeated appli-

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cations were made on the part of the plaintiff to the defendants to allow the plaintiff to have and enjoy the said houses, or to pay the plaintiff the said remuneration, but without success.

The defendants put in a joint and several answer. The defendant Gunnell said that when the plaintiff arrived at his father's house, his father in her presence told defendant that he had sent for her to give her, for her services, her board, lodging, and clothing, and what pocket-money he thought she might require, and he further said, "If she tires, she can go back again; and if she behaves herself, I shall very likely do something for her when anything happens to me." The plaintiff thereupon said she should be very glad to stay, as it would be a good home for her and her child. They denied that there was any agreement as to the amount of the pocket-money. They said they did not believe there had been any such agreement as alleged in the bill, or that Mr. Gunnell or Mr. Atkinson led the plaintiff to believe that the second codicil was a secure or irrevocable agreement. They denied all undue influence (which had been charged by the bill) as to the revocation, and finally insisted upon the Statute of Frauds, and claimed the same benefit as if they had pleaded the same or demurred to the bill.

Mr. A. O. Atkinson, the solicitor, deposed, on behalf of the defendants, that he never received from Mr. Gunnell any instructions to prepare a "secure and irrevocable agreement," nor did he imagine that any such document was to be prepared. He never heard such a thing suggested till he saw the bill. On the occasion of the testator's executing his third codicil, deponent read it over to him very carefully, and, as it was executed at his son's house, he asked him if it was done of his own free will. Testator said it was, and he told deponent that he had

determined to revoke the devise to the plaintiff on account of her improper conduct.

Mr. *Bacon* and Mr. *Roberts* for the plaintiff.

Argument.

The principle on which this bill is filed is well settled by a long series of decisions in this Court, viz., that where a representation is made by one man on the faith of which another acts, the Court will direct that representation to be made good. In *Hammersly* v. *De Biel* (*a*), and *Payne* v. *Mortimer* (*b*), where a marriage took place on the faith of representations made previously, the Court held that that representation, coupled with the marriage, constituted contracts which it decreed to be preformed. *Prole* v. *Soady* (*c*) was a strong case of the same class, differing only in its circumstances. It was quite clear from these authorities that if Gunnell were living he would be bound. It was unimportant that he supposed the codicil to be revocable: *Prole* v. *Soady* (*d*).

In *Piggott* v. *Stratton* (*e*) the Lords Justices reviewed the cases, and declared them to be in conformity with the rule above stated. The question had most frequently arisen on representations made with a view to marriage, and in almost all the cases the Court compelled the party making such representations to make them good. *Hammersley* v. *De Biel* (*f*) was the leading case on this point, and had been followed by his Honour in the case of *Payne* v. *Mortimer* (*g*), which was affirmed by the Lords Justices (*h*). In *Montefiori* v. *Montefiori* (*i*) a note given fraudulently to procure a marriage was held binding on the drawer. In *Neville* v. *Wilkinson* (*k*), the defendant having made a

(*a*) 12 Cl. & Fin. 45.
(*b*) *Antè*, Vol. 1, 118.
(*c*) Ibid 1.
(*d*) Ibid.
(*e*) 1 De G. F. & J. 33.
(*f*) 12 Cl. & Fin. 45.
(*g*) *Antè*, Vol. 1, 118.
(*h*) 4 De G. & J. 447.
(*i*) 1 Sir Wm. Bl. 363.
(*k*) 1 B. C. C. 543.

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representation that no debt was due, on the faith of which a marriage was contracted, was restrained from recovering the debt.

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On these grounds it was submitted that the plaintiff was entitled to a decree.

Mr. *Roxburgh* and Mr. *C. T. Simpson* for the defendants.

The first difficulty the plaintiff had to meet was the Statute of Frauds. Here was an alleged agreement, which it was admitted was executory; and therefore, supposing the testator did make the representation imputed to him, the plaintiff must show that it was in writing. On this ground, therefore, the bill must be dismissed.

Secondly, the equity here arose from expressions of mere intention; but that was insufficient; there must be the representation of existing facts: *Jorden* v. *Money* (*a*). In that case the precise question arose whether misrepresentation of intention was sufficient, and it was held that it was not.

Thirdly, it was submitted that this Court had no jurisdiction to vary the will, which was in effect what this bill sought. The proper course would be to apply to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Court: *Allen* v. *M^c Pherson* (*b*).

Judgment.

THE VICE-CHANCELLOR:—

Relief is sought by the plaintiff in this suit on a principle which is well established. If she can prove by sufficient evidence that the testator induced her to continue her valuable services on the faith of his representation that he would leave her the property in question at his death, she is entitled to the assistance of the Court. Lord

(*a*) 5 H. of L. C. 185. (*b*) 1 H. of L. C. 191.

Cottenham's statement of the doctrine in the case of *Hammersley* v. *De Biel* (*a*) has been repeatedly referred to and acted upon in recent cases: "A representation made by one party for the purpose of influencing the conduct of the other party, and acted upon by him, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realising those representations." Even at law it was laid down by Lord Denman, in the case of *Pickard* v. *Sears* (*b*), that, whatever a man's real intention may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation is bound by it.

There is the clearest evidence in this case of the circumstances under which the testator executed the codicil to his will by which he gave to the plaintiff that property in respect of which she now sues. The testator executed the codicil, and took the plaintiff to his solicitor's office to show it to her, and to make her aware of its contents, in order to satisfy her mind and to induce her to continue those services which she rendered to him on the faith of his representation that she would enjoy the property after his death.

It has been argued for the defendants that there is no evidenee in writing of the representation except by the codicil itself, which, being a revocable instrument, is not binding. But there is no authority to show that relief is to be refused unless the representation be in writing. The Statute of Frauds has no application to cases of this kind. No doubt there must be the clearest evidence of the representation. Anything vague or indistinct in its nature would prevent the right to relief. But in the present case the codicil is adduced

(*a*) 12 Cl. & Fin. 45. (*b*) 6 Ad. & Ell. 469.

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Judgment.

as evidence in writing of the fact of the representation, and for that purpose it is perfect evidence. In cases of this kind, a representation that the property is to be given by a revocable instrument is binding. It is the law of the Court which makes it binding, although it be of the essence of the representation that the instrument is to be of a revocable nature. No evidence of the representation can well be stronger than the actual preparation and production of the instrument, whether revocable or not; and where the preparation and production and execution of the instrument all take place for the purpose of influencing the conduct of the other party who acts upon it, the principle applies in its full force. As to the reliance which the defendant's counsel placed on the decision of the House of Lords in the case of *Jorden* v. *Money*, although the decision in that case is no doubt binding, it cannot be considered as a reversal of the decision of the House of Lords in *Hammersley* v. *De Biel*; and the proposition attributed to Lord Cranworth in the printed report, that a statement or representation of what a person intends or does not intend is not sufficient, seems irreconcilable with the decision of the House of Lords in *Hammersley* v. *De Biel*, and with the law as laid down by all judges of the highest authority. It is remarkable that the case of *Hammersley* v. *De Biel* was not referred to by any of the counsel or law lords in the case of *Jorden* v. *Money*.

It was argued that the grant of probate of the codicil is conclusive as to the revocation, and no doubt it is so; but it is the revocation which makes the assistance of this Court necessary. In cases of this kind, where the testator is bound by the effect of his representation, he cannot defeat the right to relief by bequeathing or devising the whole of his property to another person. Whoever claims under the will or codicil takes as a mere volunteer, and cannot escape the effect of any act

of the testator which has bound the property in his lifetime. The testator's representation in this case, and any other case within the application of the doctrine, binds the property which he devised to the plaintiff as completely, according to the law of this Court, as if he had bound himself in consideration of money not to revoke the gift, and had made the person named in his will a purchaser of the property devised.

If this be the correct view, a representation which affects specific property must bind the property as effectually as a representation generally to leave a sum of money would bind the general assets, and the present plaintiff is entitled not to have relief out of the general assets, but out of that specific property which the testator represented to her that she was to enjoy after his death, she having acted upon the faith of that representation and performed those services which he by the representation induced her to render.

There must, therefore, be a declaration that, it appearing that the plaintiff had been induced to render valuable services to the testator on the faith of the representation that by doing so she would become entitled to the benefit of the trusts created in her favour by the second codicil to his will, the testator had no right to revoke the said trusts; and therefore order and decree that the trusts in favour of the said plaintiff declared by the second codicil be performed, with liberty to the plaintiff to apply at chambers for any directions necessary for the due performance of the said trusts. The plaintiff's costs of the suit to be taxed and paid by the defendants William Anderson Gunnell and Edward Maw. Liberty to apply.

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May 3, 5.

M'CULLOCH *v.* M'CULLOCH.

Gift by a testator of 3000*l.* to a woman with whom he had contracted an invalid marriage, "to be for her sole and separate use during her lifetime, and while she continues unmarried: thereafter, should she marry, the principal sum with accruing interest thereon to pass into the hands of the residuary legatee"—*Held* an absolute gift subject to a gift over in case of her marrying again.

GEORGE M'CULLOCH, staff-surgeon on half-pay, by his will, dated the 29th October, 1859, made the following disposition:—

"To Agnes Bland, sometimes called M'Culloch, of Dudley Grove House, in the parish of Paddington, in the city of London, the sum of 3000*l.* sterling, the interest thereof to be for her own sole and separate use during her lifetime, and while she continues unmarried; thereafter, should she marry, the principal sum with the accruing interest thereon to pass into the hands of my residuary legatee. Also to Jane Elizabeth Bland, otherwise M'Culloch, daughter of the above-named Agnes Bland or M'Culloch, the sum of 3000*l.* sterling for her sole and separate use for ever, the interest of the said capital sum of 3000*l.* to be now applied for her maintenance and education, and thereafter as she may think proper, both as regards principal and interest. And I appoint my brother, the Rev. William M'Culloch, minister of the Free Church of Carnbee, Fifeshire, Scotland, and Alfred Peskett, Esquire, doctor of medicine, residing at Layton, in the county of Essex, England, to be my trustees in behalf of the said Agnes Bland, sometimes called M'Culloch, and of the said Jane Elizabeth Bland, otherwise M'Culloch, daughter of the said Agnes Bland, sometimes called M'Culloch, to see this instrumeut, with my intentions therein as regards each of the above-named Agnes Bland, sometimes called M'Culloch, and Jane Elizabeth Bland, otherwise M'Culloch, fully carried out. I also bequeath to my brother, the Reverend William

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M'Culloch, minister of the Free Church of Carnbee, Fifeshire, Scotland, the sum of 1000*l.* sterling for his own sole and separate use for ever, as also my horse and brougham, with the harness, at the time of my death. Also all my pictures after the demise of my mother, the pictures not to be sold out of the family. I also bequeath to my sister Lillias Sarah M'Culloch, otherwise Magennis, the sum of 500*l.* sterling for her own sole and separate use, and entirely independent of her present or any other husband she may have. I also bequeath to Alfred Peskett, Esquire, doctor of medicine, residing at Layton, in the county of Essex, England, the sum of fifty guineas for his trouble in carrying out the trust herein; and I also appoint my dearest mother Mrs. Jane M'Culloch, residing at Ash Grove Lodge, Kingstown, Dublin, Ireland, my residuary legatee, with the desire that my residuary estate be afterwards left by her in her own and my name to charitable purposes."

Probate of the will was subsequently granted to his brother.

The testator was married formerly in Ireland to a lady by whom he had one child, and from whom he was subsequently divorced by a decree of the Ecclesiastical Courts in Ireland. He never again cohabited with that lady, but during her lifetime he married Agnes Bland, the legatee, by whom he left one child.

The bill alleged that the testator was indebted to various persons in a considerable amount, and charged that Agnes Bland, otherwise M'Culloch, claimed to be entitled to the 3000*l.* absolutely; but the plaintiff charged that she had only a life interest therein. The bill also charged that the residuary legatee claimed to be entitled to the residue absolutely; but that the widow of the testator (the first wife) contended that the gift to charity at the foot of the will was void for uncertainty, and that consequently she was entitled to one third, and her child

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to the other two thirds. The sole question now raised, however, was, whether the gift to Agnes Bland was for life or absolutely.

Argument.

Mr. *Bacon* and Mr. *W. Forster* appeared for the plaintiff, and submitted the case to the Court.

Mr. *Green* and Mr. *Rumsey* for the residuary legatee.

In *Miles* v. *Clark* (*a*) the words were "400*l.* to be paid at and after my decease, and vested in the public funds, the interest whereof she shall receive when she attains twenty-one; in the event of her decease at, before, or after the said period, a gift over;" and it was held that the legatee took only a life interest in the legacy.

In *Vaughan* v. *The Marquis of Headfort* (*b*) the gift was "40,000*l.* to Lord Headfort and his children, to be secured to their use;" and it was held that Lord Headfort took with remainder to his children.

In *Webb* v. *Grace* (*c*), where the frame of the gift was like the present one, it was held that the qualifying words were a part of the original gift. On these authorities it was submitted that Agnes Bland only took for life and until her second marriage.

[*Ogle* v. *Corthorn* (*d*) and *Potter* v. *Richards* (*e*) were cited.]

Mr. *Craig*, for the next of kin, took the same view.

Mr. *Wickens* appeared for the Attorney-General.

Judgment.

THE VICE-CHANCELLOR:—

The question turns on the meaning of the word "thereafter." It seems impossible to treat that word "thereafter"

(*a*) 1 Keen, 92.
(*b*) 10 Sim. 639.
(*c*) 2 Phil. 701.
(*d*) 14 L. J. N. S. 337, Chan.
(*e*) 24 L. J. 488, Chan.

as referring to both the events, viz., dying and marrying again, because the language of the will that follows that word excludes any such construction. In my opinion that word " thereafter " refers only to the event of marrying again.

The testator, in very plain words, has given the principal sum to the lady in question; and then, for a very intelligible purpose, has directed how the interest shall be applied during her lifetime, and has added words of gift over to the residuary legatee in one event only, viz., that of her marrying again. It is impossible, therefore to hold that she takes a life estate only, when, if that construction be right, the words import a clear gift of the 3000*l.*

She has an absolute interest in the principal, with a direction that the interest only shall be applied for her use during her life, because in the event of marriage there is a gift over. Until this event happens, or if it never happens, no one but this lady can be entitled to the legacy.

There must be a declaration that Agnes Bland is entitled to the sum of 3000*l.*, with a gift over in case of her marriage. The fund to be carried to her separate account till marriage or further order; the dividends to be paid to her till marriage or further order. Liberty to apply on her death or marriage.

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March 17, 18.

SWEET *v.* MEREDITH.

An agreement for the sale of an advowson, containing a stipulation that the vendor should pay interest until the benefice became vacant (the incumbent being a son of the vendor, but not a party to the contract —*Held* not simoniacal.

THE bill alleged that, before and at the date of the agreement in question in this suit, the plaintiff was seized in fee simple in possession of the rectory of Kentisbury, North Devon. In June, 1861, the defendant agreed to purchase the advowson, subject to the incumbency of the plaintiff, the then incumbent, for the sum of 5500*l.* on the terms contained in certain documents and letters. The bill alleged that the defendant agreed to make the purchase with a view to becoming the incumbent on the first vacancy. On the 12th June, Mr. H. Sweet of Taunton, a solicitor, and a son of the plaintiff, wrote to the defendant, on behalf of his father, a letter, of which the material part was as follows:—

"I had a long consultation on the subject [the sale of the advowson] on Monday, and then received instructions not to sell for less than 5500*l.*; should you be willing to give this sum, as I am led from your letter of yesterday to hope that you will, your reply, coupled with this letter, will form a contract between us; and I therefore beg to state I am selling for my father on the terms of sale, a copy of which I enclose."

The enclosed terms, so far as they were material, were as follows:—

"Terms of the sale of the advowson of Kentisbury, Devon, of which the Rev. William Fort Sweet is the incumbent.

"The Rev. Charles Barter Sweet is the patron and the vendor.

"The advowson is sold subject to the mortgage to the

governors of Queen Anne's Bounty, on which 420*l.* and interest will remain to be discharged on the completion of the purchase, and the future incumbent is to be entitled to the profits of the living from the time he comes into possession.

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"The purchase to be completed at Michaelmas, 1861, and the conveyance to be prepared at the purchaser's expense in the usual way.

"The title shall commence with an indenture dated 18th March, 1773."

The terms also contained stipulations as to identifying and as to the title to a "bit of plantation" thrown into the glebe from the Preston estate, which was to be accepted. On the 13th June, 1861, in reply to the above letter, the defendant wrote to the plaintiff's solicitor as follows:—

"I feel much obliged for your letter of yesterday, and terms of sale of Kentisbury. If I should ever have an opportunity of going with you into the figures and calculations I made, by which you thought I was reducing my offer, you will find it comes pretty near to the same conclusion as your letter of the 12th instant. Therefore I close with your offer, and agree to purchase the advowson of Kentisbury for 5500*l.*, on the conditions of your letter of the 12th instant, and terms of sale &c. accompanying it, if, as I understand the negotiation, a vacancy is to take place at Michaelmas in completion of the purchase; not that I want to turn out your brother if he desires to occupy the house for any time, for we are very comfortable here at present."

On the 15th June, 1861, Henry Sweet, as the plaintiff's solicitor, wrote to the defendant a letter which contained the following passage:—

"I think, however, the contingency may be met of the living not becoming vacant at the time named, by my father engaging to pay you interest on the purchase

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money from the completion of the purchase until the vacancy occurs; and if you approve of this, and write me a letter to the effect that you agree to purchase the advowson on the condition of my letter of the 12th instant, and terms of sale &c. accompanying it, if my father will engage to pay you interest on the purchase money at the rate of 5*l.* per cent. per annum from the completion of the purchase until the living becomes vacant, I will write you a reply agreeing that he shall do so."

On the 17th day of June, 1861, the defendant signed and sent to Henry Sweet, as agent of the plaintiff, an agreement of that date, which was as follows:—

"I agree to purchase the advowson of Kentisbury on the conditions of your letter of the 12th instant, and terms of sale accompanying it."

On the same 17th day of June the defendant wrote and sent to Henry Sweet, as agent of the plaintiff, a letter of that date, which was in part as follows:—

"I agree to purchase the advowson of Kentisbury on the conditions of your letter of the 12th instant [meaning the said letter of that date] and terms of sale accompanying it [meaning the said terms hereinbefore set forth]. If you accept this, you can say that interest shall be paid from Michaelmas until a vacancy."

On the receipt of the last-mentioned letter the said Henry Sweet, as the plaintiff's agent, on the 18th day of June, 1861, wrote and sent to the defendant a letter of that date, which was in part as follows:—

"I beg to acknowledge the receipt of your letter of yesterday [meaning the said letter dated the 17th day of June, 1861] agreeing to purchase the advowson of Kentisbury on the conditions of my letter of the 12th instant, and terms of sale accompanying it; and on my father's part I engage to allow you interest on the pur-

chase-money (5500*l.*) at 5*l.* per cent. per annum from the completion of the purchase till the living becomes vacant," as by the said several letters will appear.

The abstract of the plaintiff's title was delivered to the defendant on the 29th day of July, 1861. No objection was made to the title disclosed thereby, nor any step taken by him towards the completion of his said purchase until the 11th day of September, 1861. Shortly before that day W. F. Sweet had informed the defendant (as was the fact) that the plaintiff was seriously ill, and on that Mr. Friend, the solicitor of the defendant, sent to Messieurs Beadons and Sweet, the plaintiff's solicitors, the draft of the proposed conveyance of the said advowson to the defendant for perusal by the plaintiff's solicitors without prejudice to any requisitions which the defendant might have to make on the title to the said advowson.

On the 30th day of September, 1861 (being the day after that on which the said purchase ought to have been completed), the plaintiff's solicitors received from the defendant's solicitor his requisitions on the title to the advowson, and on the same day the plaintiff's solicitors forwarded their replies to such requsitions to the defendant's said solicitor, who was satisfied with such replies. Before the 29th day of the said month of September the defendant entered into an agreement to let the glebe lands belonging to the rectory as from that day.

Shortly after the 30th day of September W. F. Sweet agreed with the defendant at once, in anticipation of his intended resignation of the said rectory, to give up to the defendant the possession of the rectory-house, and that the defendant should receive the profits of the said rectory as from the 29th day of September, 1861. Accordingly the defendant, on the 23rd day of October, 1861, took possession of the rectory-house, and exercised acts of ownership over the glebe lands belonging to the rectory.

Before W F. Sweet gave up to the defendant the pos-

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session of the said rectory-house he wrote to the defendant a letter dated the 8th October last, which was in part as follows:—"I conclude the money for the living will be paid at once, as I am virtually giving up possession by quitting the house; if not, I suppose the lawyers will agree on some interest till my resignation, as I shall not be receiving any proceeds of this living from Michaelmas last." In reply to this letter the defendant, on the 9th day of October last, wrote to W. F. Sweet a letter of that date, which was in part as follows:—"I saw Mr. Friend [the defendant's solicitor]; it is all satisfactory about the title, &c.; and, as I told you, the money is part of a larger sum, and what is required shall be realised as soon as possible—meanwhile you shall receive interest from the 29th ultimo."

The bill alleged that the defendant had accepted the title to the said advowson, and purchased the furniture of the said W. F. Sweet which was in the rectory-house, and had also arranged with the defendant the amount payable for dilapidations on W. F. Sweet's vacating the rectory, which amount had been allowed by him to the defendant out of the purchase-money of the said furniture.

The bill further alleged that W. F. Sweet had, ever since the 29th day of September, been ready to resign the rectory for the benefit of the defendant on his completing his purchase of the advowson, and that the living would, but for the defendant's default, have been vacant on the said 29th of September. That the defendant was still in possession of the rectory-house, and in receipt of the profits of the said rectory; but refused or neglected to complete his purchase, though he did not even allege any justifiable ground for such refusal or neglect.

The bill therefore prayed that the defendant might be decreed specifically to perform the agreement entered into by him for the purchase of the advowson, and to pay to

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the plaintiff the purchase-money of 5500*l.*, with such interest thereon as the defendant might be liable to pay, the plaintiff being ready, and hereby offering, on payment to him by the defendant of 5500*l.* and such interest as shall be payable thereon, to convey the said advowson to the defendant for an estate in fee simple in possession.

The defendant, by his answer, said he believed his solicitors had not approved the title, and he (the defendant) had not accepted such title. He alleged that it was part of the agreement, though this part was not reduced into writing, that Mr. W. F. Sweet should, on the completion of the purchase, resign the incumbency. In pursuance of Mr. W. F. Sweet's agreement to resign, defendant had let a portion of the glebe lands. Defendant said he was informed by his solicitors that the title was in some respects defective. Mr. W. F. Sweet was still the incumbent of the rectory, and the defendant had not been presented. The defendant was in possession of the rectory-house, but was not in receipt of the profits. Defendant said he did not refuse or neglect to complete the purchase, if it should be determined by the Court that he was bound so to do, and submitted whether, in his answer, he alleged any justifiable ground for such alleged refusal or neglect.

Argument.

Mr. *Malins* and Mr. *E. K. Karslake* for the plaintiff.—There was a clear agreement accompanied by part possession. The title was accepted, and then the defendant, being unable or unwilling to pay the money, set up the case of simony. It was submitted that no such case arose, the vendor of the advowson was not the clerk; the clerk was no party to the contract in any way, nor had any interest in the subject matter. Whether he resigned or not was a question entirely for himself, and neither the plaintiff nor the defendant had any authority to influence him in any way. It was

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submitted, therefore, that the plaintiff was entitled to a decree.

Argument.

Mr. *T. Terrell* and Mr. *Everett* for the defendant.—The Court looked at the substance, and not at the form, and, applying that rule, it was clear that this was a simoniacal contract. In *Grey* v. *Hesketh* (*a*), where there was a suspicion of simony, the Court ordered discovery. [*Greenwood* v. *The Bishop of London* (*b*) was also cited.]

Secondly, it was submitted that the title was not accepted, and the defendant was entitled to a reference to chambers to approve of the title. This was a reversionary right subject to the right of the existing incumbent, and this Court will not in such case decree specific performance without production of the vendor's title: *Deverell* v. *Lord Bolton* (*c*). Moreover, there should be a general reference to title, and not on one particular point: *Lesturgeon* v. *Martin* (*d*). On these grounds it was submitted the plaintiff's case failed.

Judgment.

THE VICE-CHANCELLOR:—

The effect of the stipulation for payment of interest is to increase the amount paid for the purchase of the advowson upon a principle which seems by no means unfair. There is nothing to bring the resignation of the living by the present incumbent within the scope of the contract, and the present incumbent is no party to it. Simony means a bargain for the corrupt presentation to an ecclesiastical benefice for money, gift, or reward. In the present case there is no bargain for the presentation. The subject matter of the contract is simply the right of property in the advowson on the one hand, and on the other hand the price and a certain rate of interest on the purchase-money until a vacancy occurs; and there is no bargain at all as to the presentation.

(*a*) 1 Amb. 268.
(*b*) 5 Taunt. 727.
(*c*) 18 Ves. 515.
(*d*) 3 M. & K. 255.

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Judgment.

Blackstone has justly said that the true notion of simony, although not the common notion, is the obtaining holy orders or a licence to preach by money or corrupt practices. The contract now in question is still more free from anything simoniacal upon this accurate definition; therefore there must be a decree for specific performance, each party paying his own costs of the suit.

LANGFORD *v.* GOWLAND.

March 4.

Where a testator gave all his personal estate in equal shares to eight societies, of which three, viz., the East London Free School Society, the Anti-Slavery Society, and the African Society, had become extinct before the testator's death, the last before the date of the will, the Court declined to order the shares in the fund to be applied *cy-près*, and held the next of kin entitled.

PATRICK KIERNAN, by his will in July, 1832, gave all his personalty to the plaintiff G. Langford and H. Barnewell, their executors, &c., upon trust to convert the same into money, and in the first place pay his just debts, funeral and testamentary expenses and legacies, and then to stand possessed of the residue upon trust to pay, assign, transfer, and make over one equal eighth share thereof unto the treasurer of the London Mechanics' Institution, Southampton Buildings, Chancery Lane, for the benefit of that institution, and to whom for such purpose he accordingly bequeathed the same one-eighth share. Testator then, using the same language, bequeathed the other seven eighth shares to the following societies and institutions:—To the British and Foreign School Society one equal eighth part; to the Literary Fund Society one equal eighth part; to the East London Irish Free School Society one equal eighth part; to the London Fever Hospital one equal eighth part; to the Anti-Slavery Society one equal eighth part; to the African Institution one equal eighth part; and to the

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Society for Improving the Condition of the Irish Peasantry one equal eighth part.

The testator died on the 23rd of November, 1858, a bachelor, leaving certain persons his next of kin, who were defendants.

A bill was subsequently filed by the executor against the legatees to administer the testator's estate. By the decree certain inquiries were directed. The chief clerk found that five of the societies named were in existence; and three, the East London Irish Free School Society, the Anti-Slavery Society, and the African Institution, had ceased to exist, the last-named before the date of the will, and the two others since the date of the will and before the testator's death.

Argument.

Mr. *Bacon* and Mr. *J. T. Humphrey*, for the plaintiff, submitted whether, if the bequest to the societies which were extinct at the testator's death failed, the doctrine of *cy-près* was applicable.

Mr. *Bovill* appeared for the Mechanics' Institute.

Mr. *Malins* appeared for the British and Foreign School Society.

Mr. *Hislop Clark* and Mr. *Dryden* appeared for other charities.

Mr. *Hallett*, for the Fever Hospital, submitted that where there was a clear gift for a charitable purpose which failed the Court would give effect to the intention by directing a *cy-près* application of the fund. In *Pieschel* v. *Paris* (*a*), where the testator showed a clear intention of disposing of dividends for certain charitable institutions, and specified some, and the sums, but left a blank for others, the Court directed a scheme to be prepared for the application of the remaining dividends. In

(*a*) 2 S. & St. 384.

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Moggridge v. *Thackwell* (*a*) it was held that where there is a general indefinite charitable purpose to be administered by trustees the Court will administer the trusts. In *Mills* v. *Farmer* (*b*), where the testator directed his residue to be divided for charitable purposes mentioned, and for others which he expressed his intention of naming, but omitted to do so, the Court directed the disposition to be carried into effect, having regard to the objects pointed out by the testator. In *The Attorney-General* v. *The Ironmongers' Company* (*c*), where the testator directed one moiety of the income of his personal estate to be applied to a charitable purpose which failed, and the other moiety to one capable of taking effect, the Court held that it had jurisdiction to apply the moiety which failed on the principle of *cy-près*. That was in fact this case. [*The Attorney-General* v. *Andrews* (*d*), *Martin* v. *Margham* (*e*), were also cited.]

Mr. *Wickens*, for the Attorney-General.—If the description of the objects of the testator's bounty shows that they are charitable objects, this Court will find a general charitable gift in the description; and though the object fails the purpose will prevail: *Reeve* v. *The Attorney-General* (*f*), *Coldwell* v. *Holme* (*g*), *Loscombe* v. *Wintringham* (*h*), *Hayter* v. *Trego* (*i*).

Mr. *Greene* and Mr. *H. R. Young*, for the next of kin.

Judgment.

THE VICE-CHANCELLOR.—The language of this will is so clear and explicit as to exclude any general charitable purpose of the same kind as those described by the testator. Declare that the next of kin are entitled to the three eighths.

(*a*) 7 Ves. 36.
(*b*) 1 Mer. 55.
(*c*) 2 M. & K. 576.
(*d*) 1 Ves. sen. 225.
(*e*) 14 Sim. 230.
(*f*) 3 Hare, 191.
(*g*) 2 Sm. & Giff. 31.
(*h*) 13 Beav. 87.
(*i*) 5 Russ. 76.

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May 27.
June 5.

Re GOODWIN'S SETTLED ESTATES AND THE SETTLED ESTATES ACTS 1856 & 1858. *Ex parte* BUTLER.

In determining what, under the Settled Estates Acts, is a settled estate, the Court will refer to the state of circumstances at the date of the instrument, not to the circumstances at the time when it came into operation.

Interests arising "by accruer" under trusts to which property stands limited are within the meaning of the word "succession."

Where parties entitled absolutely to some of the shares joined as petitioners the Court decreed the whole estate to be sold.

THIS was a petition under the Settled Estates Act praying that certain settled freehold dwelling-houses, or messuages and freeholds, &c., known as the Westcliffe estate, West Cowes, might be sold (*a*).

The petition stated that the petitioners Frederick J. Butler and Maximilian H. Geneste were proper persons to convey; also, that no application had been made at any time by any of the petitioners for a private Act of Parliament; and prayed for a sale and distribution of the proceeds in equal ninth shares.

On the 13th December, 1861, an order was made by his Honour, for sale, as prayed; but, upon the abstract of title being laid before one of the conveyancing counsel, a question arose as to the jurisdiction of the Court; and by another order made on the 12th May last all proceedings under the order of the 13th December were directed to be stayed.

Sarah Goodwin, late of West Cowes, in the Isle of Wight, widow, by her will dated the 17th November, 1831, devised and bequeathed the property now in question to trustees (whom she also appointed her executors), and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, upon trust to receive the rents, issues and profits during the life of her daughter Sarah Geneste, wife of the Rev. Maximilian Geneste, and to pay the same to or for the benefit of her

(*a*) See *Cunningham* v. *Butler*, *antè*, 37.

said daughter, or to permit her or her said husband, or her or their assigns, to receive the same during her life; and in case she should die leaving the said Maximilian Geneste her surviving, then upon trust to pay one third of the said rents, issues and profits to the said Maximilian Geneste for his life; and as to the remaining two thirds of the said rents, issues and profits, to stand possessed thereof to and for the benefit of the said children of the said Sarah Geneste, and to be divided equally between them, if more than one; but if but one child, then to such only child, for and during the life of the said Maximilian Geneste; and in case such child or children or either of them should be under the age of twenty-one years at the time of the death of the testatrix's said daughter, then the testatrix directed her said trustees, or the survivor of them, his heirs, executors, administrators, and assigns, to apply and dispose of the share of such child or children so being under the age of twenty-one years, for and towards his, her, and their maintenance and education, or otherwise for his, her, or their benefit; and what might remain over and above the expenses of his, her, or their maintenance and education, she directed her said trustees or trustee to lay out or invest the same in the purchase of stock in the public funds, or upon Government or other good security at interest, and to stand possessed thereof for the benefit of such child or children so being under the age of twenty-one years, and to pay the same to such child or children upon his, her, or their attaining the said age of twenty-one years. And from and after the death of her said daughter, in case she should survive her said husband, or from and after the death of the said Maximilian Geneste, in case he should survive her said daughter, then the testatrix gave and devised the said property, and the rents, issues, and profits thereof, unto her said trustees, or the survivor of them, his heirs, executors, administrators and assigns, upon trust

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for the child, if only one, and if more than one then for all the children of her said daughter Sarah Geneste equally to be divided between or amongst them, share and share alike as tenants in common; the share or shares of such child or children being a son or sons to be vested in him or them when he or they should attain his, her, or their age of twenty-one years; and the share or shares of such child or children being a daughter or daughters to be vested in her or them on her or their attaining the age of twenty-one years, or being married, which should first happen. The testatrix further declared and directed that there should be survivorship and accruer between the said children in the event of the death of any or either of them, in case he, she, or they should die before having acquired a vested interest or vested interests in her said estates as aforesaid; and that the interest of the presumptive share of each child should be applied towards his or her maintenance and education as therein mentioned. And in explanation of that her will, the testatrix thereby declared that it was her wish and intention that the said property, and the rents, issues, and profits thereof, should, from and after the death of her said daughter Sarah Geneste and the said Maximilian Geneste, become the absolute and disposable property of the child or children of her said daughter Sarah Geneste, his, her, or their heirs, executors, administrators, or assigns, but not to become vested in him, her, or them until the time or times before set forth as to the payment of the two third parts or shares of the rents, issues, and profits thereof during the life of the said Maximilian Geneste. In the event of the death of Sarah Geneste without leaving any child or children surviving, or if they should all die before attaining vested interests, testatrix gave the rents, issues, and profits to the said Maximilian Geneste for life, and from and after the death of the survivor without issue as aforesaid with divers remainders

over. The testatrix also gave and devised all the rest, residue and remainder of her estate and effects, subject to the payment of her debts, legacies, funeral and testamentary expenses, to her daughter Sarah Geneste, her heirs, executors, administrators, and assigns.

Statement.

The testatrix made a codicil to her will, dated the 9th November, 1833, whereby, after reciting that she had otherwise provided for the said Maximilian Geneste, she revoked the bequest to him for life of one third of the rents, issues, and profits of the property, in case he should survive her daughter, and thereby bequeathed the whole of the rents, issues, and profits, after the death of her said daughter, upon the same trusts as she had directed of the said two thirds of the same. Neither the will nor the codicil contained any power to any person to sell or demise any part of the property.

The testatrix died on the 9th January, 1858, and the will and codicil were proved on the 20th March following by the said Maximilian Geneste, the sole executor; the other trustee and executor having died in the testatrix's lifetime.

Sarah Geneste died on the 15th March, 1856, in the lifetime of the testator, leaving nine children, viz., the petitioner Sarah Catherine, wife of the petitioner Frederick John Butler; Mamimilian Goodwin Geneste (since deceased), her eldest son, and afterwards heir-at-law of the testatrix; the petitioners Louis D. B. Geneste, Maximilian Hodgson Geneste, Jane Mary Geneste, and Charles John Geneste, all of whom, at the time of presenting the petition, had obtained the age of twenty-one; and the petitioners Francis A. B. Geneste, Hugh Close Geneste, and Alice Sophia Geneste, who were still infants.

On the 24th March, 1858, the petitioner Frederick John Butler was appointed a trustee of the will in the place of the deceased trustee.

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Maximilian Goodwin Geneste died on the 30th July, 1858, intestate, leaving his father Maximilian Geneste his heir-at-law.

The share and interest of the petitioner Sarah Catherine Butler (then Geneste), by an indenture of settlement dated the 15th January, 1855, made previous to her marriage, became vested in the petitioners John William Cunningham, Daniel Bennett, William Barrow Simonds, and Thomas Butler, as trustees.

The three infant petitioners, Edith Mary Butler, Catherine Maude Butler, and Ella Geneste Butler, were the issue of the marriage of Frederick John Butler and Sarah Catherine, his wife.

The petitioner William Day was a mortgagee of the share to which Maximilian Geneste became entitled as heir-at-law of his son Maximilian Goodwin Geneste.

Maximilian Geneste died on the 27th July, 1860, having by his will and codicil appointed the petitioners John William Cunningham and Maximilian Hodgson Geneste his executors. By his will dated the 7th August, 1858, he devised and bequeathed all his real and personal estate to his said executors upon trust to convert the same into money, and to stand possessed of the proceeds of the same, and of the rents of his real estate until sold, upon trust for such of his children as should have attained or should attain twenty-one, or die under that age leaving issue, equally to be divided between them as tenants in common; and he declared that the wife or husband of any child dying in his lifetime or under twenty-one, and in either case without leaving issue, should be entitled to a life interest in the share of her husband or his wife respectively. By a codicil to his will he declared that the share of his son the petitioner Louis D. B. Geneste should be held for his benefit in strict settlement.

The petitioner Jane Pittis was a mortgagee of the share of Maximilian H. Geneste, and the petitioner

Francis Pittis was a mortgagee of the share of Louis D. B. Geneste.

By an indenture of the 22nd August, 1860, the share of the petitioner Louis D. B. Geneste was conveyed to the petitioners Maximilian Hodgson Geneste and John W. Cunningnam, their heirs and assigns; and by a deed-poll dated the 13th September, 1860, trusts were declared of the said share so conveyed.

On the 19th September, 1860, the petitioner Maximilian Hodgson Geneste was appointed a trustee of the testatrix's will, in the place of his late father, in conjunction with the petitioner Frederick J. Butler.

The order of the 13th December, 1861, was stayed in consequence of doubts having been raised by Mr. Dart the conveyancing counsel as to the jurisdiction of the Court. The following passage is extracted from the opinion of Mr. Dart:—

"It seems clear that as respects the two shares that have been resettled [*i.e.* the shares of Mrs. Butler and of Maximilian Goodwin Geneste, resettled by the father's will] the jurisdiction of the Court depends upon the resettlement; that as respects the four shares of the other adult children the Court has (*a*) jurisdiction; and that, as respects the shares of the three infants the only ground upon which it can be contended that the Court has jurisdiction is that the accruer and survivorship clauses create a 'succession' within the meaning of the Act" (*b*).

(*a*) The word "no" seems to be omitted by mistake.

(*b*) The following are the clauses which relate to the question:—

19 & 20 Vic. c. 120, sect. 1. "The word 'settlement,' as used in this Act, shall signify any Act of Parliament, deed, agreement, copy of court-roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure, or any estates or interests in any such hereditaments, stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively; and the terms 'settled estates,' as used in this Act, shall signify all heredita-

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Statement.

The case of *Re Burdin's will* is a decision that survivorship and accruer clauses have not the effect of creating a succession under the Act. The point was so held by

ments of any tenure, and all estates or interests in any sueh hereditaments which are the subject of a settlement; and for the purposes of this Act a tenant in tail after possibility of issue extinct shall be deemed tenant for life."

Sect 16. "Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life, or any greater estate, may apply to the Court, by petition in a summary way, to exercise the powers conferred by this Act."

Sect. 17. "Subject to the exception contained in the next section, every application to the Court must be made with the concurrence or consent of the following parties, namely, where there is a tenant in tail under the settlement of full age, then the parties to concur shall be such tenant, &c., &c. . . . . and in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, prior to the estates of such tenant in tail, and also all trustees having any estate or interest on behalf of any unborn child."

Sect. 18. "Provided, nevertheless, that, unless there shall be a person entitled to an estate or inheritance whose consent or concurrence shall have been refused or cannot be obtained, it shall be lawful for the Court, if it shall think fit, to give effect to any petition, subject to and so as not to affect the rights, estate, or interest of any person whose consent or concurrence has been refused or cannot be obtained, or whose rights, estate, or interest ought, in the opinion of the Court, to be excepted."

Sect. 28. "After the completion of any lease or sale, or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorise the same, except that no such lease, sale, or other act shall have any effect against any person whose concurrence in or consent to the application ought to have been obtained, and was not obtained."

21 & 22 Vic. c. 77, s. 1. "For the purposes of the definitions of 'settlement' and 'settled estates' contained in the first section of the said Act (above), all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor, or descending to the heir of a testator, shall be deemed to be estates coming to such settlor

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Vice-Chancellor Kindersley (*a*), and his decision was affirmed by the Lords Justices, upon the case being mentioned to them (*b*). "Even as respects the shares of the adult children, it may be collected from the case of *Re Thompson's Settled Estates* (*c*), that an order directing the sale of settled shares and unsettled shares, as a whole, is on that ground irregular *quà* the settled shares, and that the irregularity is not cured by the mere concurrence of the owner of the unsettled shares. Were the consents of all the parties interested under the settlements obtained?"

Statement.

Mr. *Craig*, and Mr. *J. N. Higgins* now moved that the above order of the 12th May staying the order of the 13th December, 1861, might be discharged, and that the order for sale might be proceeded with. The Court had statutory jurisdiction to sell the whole estate. It was not disputed that two shares of the estate were in settlement, and subject to the operation of the Act; and it might be contended that, if the interest of one of several persons entitled jointly or in common to an estate, be a "settled" interest, it followed from the tenor of the definitions in the Act that the whole estate was a "settled estate." It might be that the Court had not the power to order a compulsory sale against the other persons entitled, but that it had power to sell the whole estate, provided it had the consents of those persons whose concurrence was required by the Act, could hardly be disputed. In this case all the persons whose consent was required had concurred, the infants consenting and petitioning by their guardians. Further, the interests of the petitioners were actually by the terms of the will limited to them "by way of succession," inasmuch as they could not have taken

Argument.

or heir under or by virtue of the settlement.

(*a*) 4 Aug. 1859.

(*b*) 28 L. J. 840, Ch.

(*c*) 1 Johns. 418; affirmed on appeal, 3rd Aug. 1859.

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till after the death of the tenant for life: *Grey* v. *Jenkins* (*a*). Moreover, the clauses of survivorship and accruer alone were sufficient to create limitations "by way of succession," and thus to make the whole estate a "settled estate."

Argument.

In the case *Re Burdin's will*, there was no clause of survivorship and accruer; there was an absolute gift to such children only as attained twenty-one. The case of *Re Thompson* was not affirmed; it was compromised on appeal. The principal item in the property here was an advowson, which would be unsaleable in shares.

Mr. *G. W. Lawrance*, *contra*.—The case of *Re Burdin's will* showed that this was not a "succession;" consequently that the estate was not a "settled" estate, except as to the two resettled shares. The only difference between that case and this was, that in *Re Burdin's will* there was a gift direct only to children who should attain twenty-one; while here there was a gift to children generally with a survivorship and accruer clause as to the shares of those dying under twenty-one; the former being the modern, and the latter the older plan of effecting the same result; but if so, then, on the authority of *Re Thompson's settled estates*, the Court had no jurisdiction to sell any but the two settled shares, and the consents of those who were *sui juris* would not let in the jurisdiction. The four children who were entitled absolutely could sell without the aid of the Court; and the three who were infants could not by their guardians consent to a sale of their shares during infancy.

Judgment.

THE VICE-CHANCELLOR:—

The question whether property is "settled" within the meaning of the Act must be determined with re-

(*a*) 26 Beav. 351.

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ference to the state of things which existed at the date of the instrument, and not by reference to the state of things which may exist when it comes into operation. If the language of the instrument limits the property by way of succession, it must be treated as a settlement by which the property stands so limited. The falling-in of the life estate of the daughter in the lifetime of the testatrix does not alter the nature of the instrument as limiting the estate in succession, and cannot release the shares which fell to the children on the death of the testatrix from the operation of the Act. I also think that any shares which may accrue would constitute a "succession" under the Act. I am also of opinion that those shares which have vested absolutely in the children who have attained twenty-one may be included in the order for sale upon the persons so entitled becoming co-petitioners. To hold otherwise might occasion great inconvenience when an estate is held in shares. The order made in chambers must he discharged, and the sale be proceeded with as to the entirety of the estates, as directed by the order on petition.

LANE *v.* STERNE.

May 8.

A seizure of partnership assets in the possession of a receiver appointed by the Court, of which the execution creditor had notice, held to be a contempt on the part of the execution creditor and of the sheriff; and the Court ordered both respondents to pay the costs of the seizure and of a motion to commit for such contempt.

THIS was a motion on behalf of the plaintiffs that the Sheriff of Surrey and his officer, and one Leverson, might be committed to the Queen's Prison for contempt, and might be ordered to pay the costs of such contempt, and of the seizure at law, and also of this application. It appeared that Messrs. Sterne and Lane had been

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engaged in partnership as wheelwrights in the Borough. Early in 1862 Mr. Lane filed his bill in this Court praying for a dissolution of the partnership, in which ultimately a decree for a dissolution was made, and a receiver was appointed, who entered into possession of the plant, stock in trade, assets, and effects of the partnership

It appeared that Mr. R. Leverson, the execution creditor, recovered judgment at law against Sterne on a bill of exchange accepted by him in the name of the partnership. Leverson was aware that a receiver had been appointed, but placed the writ in the sheriff's hands, which was in the usual form. The indorsement was as follows:—Indorsement:—Levy, 103*l.* 10*s.* 6d., and 1*l.* 10*s.* for costs of execution, &c., and also interest on 103*l.* 10*s.* 6*d.*, at four pounds per centum per annum, from the 16th day of April, 1862, until payment; besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses. This writ was issued by *Montague Richard Leverson*, of 12, St. Helen's Place, in the City of London, attorney for the said plaintiff. The defendant is a merchant, and carries on business, Steam Wheelworks, at 29 and 30, Newington Causeway, in your Bailiwick.

On the 24th April the sheriff's officer made a levy on the partnership assets which were on the partnership premises in the custody of the receiver, who, as appeared by the evidence, distinctly informed the officer that the goods were in the receiver's possession under an order of the Court of Chancery, and gave him a notice in writing to that effect; but the officer refused to give up the property, though before this notice of a motion to commit was given he withdrew.

Argument

Mr. *Bacon* and Mr. *Prendergast*, for the plaintiff Lane, now moved to commit the sheriff and the execution creditor for contempt, and asked that they might be directed

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to pay the costs at law, and of this application. They submitted that notice to the officer was notice to the sheriff, and notice to the sheriff was notice to the execution creditor. They cited *Russell* v. *The East Anglian Railway Company* (*a*).

Argument.

Mr. *Lindley* for the execution creditor, submitted that it was shown by the evidence that the bill was drawn to raise money for the joint business, and the money was actually carried to the partnership account. It was therefore, in the strictest sense, a partnership debt. On the 16th April judgment was obtained against Sterne, and a *ca. sa.* issued; but, on it being impossible to find him, a *fi. fa.* was issued, which the officer executed on the 24th April.

It was quite clear that the execution creditor had a right to take any goods belonging to Sterne in his sole right, but that was all the execution creditor had directed the sheriff to do. The reference to the place of the partnership business was merely for description. By placing the writ in the sheriff's hands the execution creditor simply directed the sheriff to take in execution what he legally might take, and was not to be held responsible for the illegal or improper acts of the officer.

[*Willson* v. *Tumman*(*b*) and *Childers* v. *Wooler*(*c*) were cited.]

THE VICE-CHANCELLOR:—

Judgment.

It is clear that by the endorsement on the writ the execution creditor directed the sheriff to go to the place of business of the firm. It is equally clear that before the writ was issued he was aware that a suit was pending, and had sufficient notice of the appointment of a receiver. The sheriff's officer, when he intruded on the partner-

(*a*) 3 M. & G. 104.
(*b*) 6 M. & G. 236.
(*c*) 6 Jur. N. S. 444.

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ship property, was told that the receiver was in possession under the order of this Court. A contempt, therefore, has been committed. The Court, in this class of cases, does not ordinarily punish the offence by actual committal, it uniformly makes those who have committed such contempt pay the costs and expenses occasioned by the improper conduct of those who are guilty of the contempt. The order, therefore, must be to tax the costs of the seizure and of this motion, and direct them to be paid by Leverson and the sheriff.

Feb. 16, 17.

PHILLIPS *v.* TREEBY.

Where the defendant agreed to grant to the plaintiff the right to use certain roads and ways (delineated on the plan) in and through his estate, the Court restrained the defendant from continuing a wall at the extremity of his estate which obstructed the plaintiff from passing through the roads into the land of other land-owners.

THIS was a suit for the specific performance of an agreement to grant the use of certain roads. The question turned upon the construction of a clause contained in a deed dated the 16th day of July, 1853, which was made and executed by and between the defendant John Wright Treeby of the one part, and the defendant Stephen Phillips of the other part. The deed recited that the parties were the owners of lands adjoining each other in the parish of Paddington; that the defendant was the owner of waterworks called the Westbourne Waterworks, and that the parties had agreed to enter into certain covenants thereinafter mentioned, as well for the supply of water to the plaintiff's estate as for the use of the roads over the defendant's estate. The clause in dispute was a follows:—"And for the considerations aforesaid the defendant, for himself, his heirs and assigns, hereby agrees that in case the plaintiff, his heirs and

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assigns, shall in all things perform his and their parts of the said agreement, to give and grant unto the plaintiff, his heirs and assigns, and his and their lessees and occupiers, full and free permission to use at all times the roads and ways in and through his said estate, and to make the several openings and ways in and upon the same already agreed upon and set out in a plan signed between the parties."

There were two roads set forth in the plan, called the St. Columb Road (now Tabor Road) and the Elgin Road, passing over the land of Mr. Samuel Coward Walker to and from the defendant's land, and communicating with and leading to and from the plaintiff's land.

The bill alleged that the defendant had, in violation of the agreement, erected a wall across the Elgin Road and a fence across the St. Columb Road, on the line of division between his land and Mr. Walker's, so that the plaintiff and his tenants were deprived of the use of the St. Columb Road where and so far as the same passed over Mr. Walker's land, and were absolutely deprived of the use of the same as a means of access to the district lying west of the defendant's land; also that they were deprived of the use of the Elgin Road, and in great measure of the benefit of the roads on the defendant's lands.

The prayer of this bill was for specific performance of the agreement of the 10th of July, 1853, and for an injunction to restrain the defendant from permitting the obstructions to remain.

Argument.

Mr. *Greene* and Mr. *Hardy* appeared for the plaintiff, and contended that the whole object of the agreement would be defeated if the defendant was permitted to obstruct the thoroughfare along the roads as he claimed the right to do.

Mr. *Bacon* and Mr. *G. Millar* appeared for the defen-

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dant, and contended that the defendant was entitled to construct a wall on his own property. He had given the plaintiff the right to enjoy all he could give him. He had no power to give him a right to enter the land of others. It was submitted that the bill must be dismissed with costs.

Judgment.

THE VICE-CHANCELLOR:—

The question in the case was, whether the defendant has the right to continue a wall or fence which obstructs the communication through his land along what is called the St. Columb Road, and along another road called the Elgin Road. There is no doubt that both the St. Columb Road and the Elgin Road traversed to a certain extent the estate of the defendant; they are roads through his land, and are clearly roads within the stipulation of the deed of the 10th July, 1853, upon which the plaintiff founds his right. In that deed, in consideration of certain advantages which the defendant was to derive from supplying water to the plaintiff and his tenants, there is contained this stipulation:—"And for the considerations aforesaid the defendant, for himself, his heirs and assigns, hereby agrees that in case the plaintiff, his heirs and assigns, shall in all things perform his and their parts of the said agreement, to give and grant unto the plaintiff, his heirs and assigns, and his and their lessees and occupiers, full and free permission to use at all times the roads and ways in and through his said estate." Both the roads in question are roads through the defendant's estate, and the only doubt is, whether the erection and continuation of the wall or fence which, it is admitted, obstructs the passage across the road where his, the defendant's, land terminates, is consistent with the language of this agreement "to give permission to the plaintiff at all times to use the roads and ways in and through his estate." The meaning of the word "through" in this

stipulation seems reasonably plain; and it is not easy, consistently with the natural meaning of that word, to hold that the plaintiff and his lessees can use the road through the defendant's estate if at the end of one of these roads there is an obstruction which prevents their going along it. The notion that it is a compliance with the agreement to permit the plaintiff and his lessees to drive or walk up to this obstruction, and then turn back, cannot be entertained.

There is an executory part of the clause which binds the defendant "to make the several openings and ways in and upon the same already agreed upon." These words follow the permission to use the roads and ways through his estate.

It is an important question whether beyond the bounds of the defendant's estate the roads are traversable or not; because the question which the Court has to decide is, whether the continuance of an obstruction at the end of the road, constructed upon the land of the defendant, is consistent with the right conferred on the plaintiff to use the road through his estate.

On the whole case the plaintiff is entitled to a decree of the Court — not for specific performance, which is not the relief to which the plaintiff is entitled—but to a declaration "that, according to the true construction of the articles of agreement dated the 10th of July, 1853, in the pleadings mentioned, the plaintiff having in all things performed his part of the said agreement, the defendant is bound to give and grant unto the said plaintiff, his heirs and assigns, and his and their lessees and occupiers, full and free permission to use, at all times, the roads and ways in and through the said defendant's estates in the pleadings mentioned." That follows the language of the instrument.

There must also be an order for an injunction to

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restrain the defendant from making and continuing the wall or fence in the pleadings mentioned, or any other wall or fence which should prevent the plaintiff, his heirs and assigns, and their lessees and occupiers, from the free use of the St. Columb Road and Elgin Road respectively through the said defendant's estate, and from the free use of any of the other roads and ways through the defendant's estate; and to tax the plaintiff's costs of the suit. Order the defendant to pay them, and give liberty to apply.

May 27.

LEWIS *v.* POOLE.

In a foreclosure suit against a husband and wife, the agreement for the mortgage having been entered into by the wife when a *feme sole*, and part of the monies paid to her; but the mortgage executed by both husband and wife, the Court made a decree against both.

THE bill in this case was filed by the plaintiff against Mr. and Mrs. Poole, alleging that the sum due to him was about 650*l.*, and praying for an account and payment of the amount with costs which should be found due; or that the defendants might be foreclosed; or that the said premises might be sold and the produce of the sale might be, after payment of the costs, applied as far as necessary, in discharge of the security.

The mortgage deed was dated the 21st July, 1853, and was made between Greenwood Poole and Marianne Eleanora Charlotte Poole his wife of the one part, and the plaintiff and James Sutton of the other part, and recited that Greenwood Poole was absolutely entitled in right of his wife to the reversionary interest in certain sums of Bank Annuities then standing in the Court, upon trust for her, subject to a life estate, and that he was

entitled to a policy of assurance on his own life in the Mitre Assurance Society for the sum of 500*l.*, and that it had been agreed that the repayment of a sum of 400*l.*, and of such further sums, if any, as might be lent, with interest for the same, should be secured in manner therein mentioned; in consideration of the sum of 400*l.* paid to Greenwood Poole by the said Lewis and James Sutton, he the said Greenwood Poole assigned the said policy of assurance, and he and his said wife (so far as she lawfully might or could) assigned the said Bank Annuities to the plaintiff and James Sutton, their executors, administrators, and assigns, to secure the repayment of the sum of 400*l.*, and all other sums which should be advanced by the said mortgagees, or either of them, with interest at 5 per cent., with power, in case of default, to sell the said premises thereby assigned. The equity of redemption in the premises was by the deed reserved to Greenwood Poole and Marianne his wife. The indenture also empowered Lewis and Sutton to effect one or more policies of assurance on the life of Greenwood Poole in case the policy effected by himself should become vitiated, and to charge him the sums so paid and interest thereon.

Greenwood Poole and Marianne E. C. Poole his wife were married on the 22nd of June, 1853. The agreement for the mortgage was entered into between the intended husband and wife prior to the marriage, and it was only by accident that the indenture was not executed until after the marriage. The defendant Marianne Charlotte Poole having agreed before her marriage to make such mortgage of her reversionary interest, Lewis and James Sutton advanced to her before her marriage the sum of 50*l.*, part of the mortgage money, and the remainder, including a further sum of 40*l.*, was paid upon the faith of the mortgage, coupled with the indenture.

The policy of insurance became void by default in pay-

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ment of the premium, and in lieu thereof the plaintiff effected five other policies on the life of Greenwood Poole, for the sum of 100*l.* each, and paid the premiums as they became due. James Sutton died in 1859.

The defendants, in their answer, stated that it was well known to the plaintiff previously to their marriage that the 50*l.* part of the mortgage-money about to be advanced was to be for the use of the defendant Greenwood Poole, and that without and in the absence of any direction, authority, or consent, either express or implied, on the part of the wife, the plaintiff and James Sutton paid the remainder of the sum of 400*l.*, after deducting the 50*l.*, and the premium on the policy of assurance, and the costs of the indenture, to the defendant Greenwood Poole for his sole and absolute use and benefit. They denied that any further sum had been paid on the security of the indenture, and submitted whether the plaintiff was entitled to the relief as prayed by the bill.

Argument.

Mr. *Craig*, and Mr. *J. N. Higgins* for the bill. They contended that by the deed the equity of redemption was reserved to both husband and wife. The mortgage was, in fact, the wife's mortgage; she had contracted for it previous to her marriage, and part of the money had been advanced to her whilst she was a single woman. A married woman, entitled to the equity of redemption of a mortgaged estate, will be foreclosed without a day to show cause when she should become discovert: *Mallack* v. *Galton* (*a*).

Mr. *Henriquez* appeared for the defendants.

Judgment

THE VICE-CHANCELLOR:—

Inasmuch as by the deed the right of redemption was

(*a*) 3 P. Wms. 352, see note.

reserved to both husband and wife, there must be a decree for foreclosure against them both in the common form. There are also in this case the additional circumstances that the contract was made by the wife whilst a *feme sole*, and that part of the money has been paid to her before marriage.

JESSOP *v.* BLAKE.

June 4.

LUCY COPLAND, widow, by her will dated the 23rd of February, 1846, after reciting that her husband, Alexander Copland, by his will gave three tenths of the produce of his residuary real and personal estate to her for life, and, after her death, to such of his children or grandchildren living at her death, in such manner as she should by her will appoint; in execution of the said power the testatrix appointed that the said three tenths of the said residuary estate should, from and immediately after her own death, go and belong to the children and grandchildren of her late husband, in manner following, that is to say, in such manner that her grandchildren, Alexander Lester Copland, the plaintiff Maria Lucy Jessop, and Amy Ursula Copland, the three children of her late son Alexander Copland, deceased, should in the first place receive the sum of 11,000*l.* as tenants in common; and after certain other appointments immaterial to this

A married woman under a general power of appointment exerciseable during coverture, by deed of appointment executed after marriage, appointed the property to trustees on trust during the joint lives of herself and her husband for her sole and separate use; and if she should survive her husband, on trust for herself absolutely; but in case she predeceased him, as she should appoint; and in default of her appointment, to her next of kin. There were no children, and the marriage having been dissolved by a final decree of dissolution on account of the husband's misconduct—*Held*, that the wife was absolutely entitled.

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question the testatrix appointed that all the unappointed parts of the said three tenths should go in the proportion following, that is to say, two thirds thereof to her daughter Lucy Griffiths, and the residue of such three-tenths to the said Alexander Lester Copland, the plaintiff, and the said Amy Ursula Copland; the testatrix further directed that, as concerning the shares thereby appointed to the plaintiff, the same should be for her separate use, and as she should appoint by any writing, in all respects independent of any husband.

Lucy Copland died on the 24th October, 1849.

The plaintiff was a grandchild of the testatrix by her husband Alexander Copland, and on the 7th September, 1844, intermarried with J. T. Jessop. At the date of the indenture now in question she was living separate from him.

By the indenture dated the 20th February, 1851, made between the plaintiff of the one part, and two trustees (of whom the defendant J. G. Blake was the survivor) of the other part, all the one third part or share of the plaintiff in the said sum of 11,000*l.*, and of and in the residue of the said three tenths of the produce of the said residuary estate, were appointed, conveyed, and assigned by the plaintiff to the said trustees "upon trust that they should, as soon as conveniently might be, procure the assignment and transfer to them of the said parts or shares so appointed to the plaintiff as aforesaid, and should, during the joint lives of the plaintiff and the said J. T. Jessop, pay the interest, dividends, and annual produce of the said trust premises to the plaintiff for her sole and separate use independently and exclusively of the said J. T. Jessop, and of his debts, control, interference, and engagements, but so nevertheless that the plaintiff should not have power to deprive herself of the benefit thereof by any sale, mortgage, or charge, or otherwise in the way of anticipation, and so that the receipts

of the plaintiff and no other receipts should be good and effectual discharge of the said dividends, interest, and annual produce; and should from and after the decease of either of them, the plaintiff and the said J. T. Jessop, stand and be possessed of the said trust property upon the trusts following, that is to say, if the plaintiff should survive the said J. T. Jessop, then in trust for her heirs, executors, administrators, and assigns, according to the respective natures thereof. But in case she should die in the lifetime of her husband, the said J. T. Jessop, upon and for such trusts, intents and purposes, and with, under, and subject to such powers, provisoes, and declarations as she, the said plaintiff, notwithstanding her said coverture, should by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature or purporting to be a will or codicil, direct or appoint. And in default of any, and subject to such direction or appointment, and so far as any such direction or appointment, if incomplete, should not extend, in trust for such person or persons as at the decease of her, the said M. L. Jessop, would have become entitled to the said trust property and premises under the statutes for the distribution of the personal estate of intestates, in case the plaintiff had died possessed thereof, and without having been married; such persons, if more than one, to take as tenants in common in the shares in which they would have been entitled under the same statutes."

On the 22nd of June, 1861, the marriage was dissolved (*nisi*) by an order of the Court for Divorce and Matrimonial Causes, at the suit of the plaintiff, on the ground of adultery and desertion by the husband; and on the 12th of November, 1861, a final decree of dissolution was pronounced. There had been no children of the marriage.

The plaintiff, M. L. Jessop, filed this bill, alleging

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that the indenture of the 20th of February, 1851, was made and executed by the plaintiff to protect the property therein comprised from any control over the same, or from the liabilities of the husband; and solely for the benefit of the plaintiff, and in order to put the plaintiff in the position of a *feme sole*, so far as the law at that time would permit a married woman to be; and she prayed that it might be declared that the plaintiff was entitled to have a fund of Consols (626*l.* 16*s.* 6*d.*) and two sums of cash (5000*l.* and 300*l.*), and the securities for the same, being or representing the plaintiff's third share in the three tenths of Alexander Copland's residuary estate so appointed to her as aforesaid, transferred to her absolutely, and that the defendant might be ordered to transfer the same accordingly.

Argument.

Mr. *Schomberg* appeared for the plaintiff, and submitted that she must be treated in that Court precisely as if her former husband had died on the 12th November, 1861; but if so, under the express trusts of the deed, she would now be absolutely entitled.

Mr. *Hoare* appeared for the trustee, and submitted that this was a post-nuptial settlement to which the husband was no party.

Judgment.

THE VICE-CHANCELLOR:—

The right of this lady seems clear. The object of this deed having been to withdraw the whole property from the control of the husband, it has now ceased to have any operation; and she is now absolutely entitled. Declare that in the events that have happened the plaintiff is absolutely entitled. Costs out of the fund.

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GOODMAN *v.* GOODMAN.

June 6.

Under a bequest to the children of L. S. who had three children born to him in England while domiciled there by a woman with whom he cohabited, and with whom he removed to Holland, and while domiciled in Holland had another child born to him by the same woman, whom he afterwards married in Holland.—*Held*, that the law of the country of the domicil at the time of the birth and of the marriage must prevail, and that the child born in Holland was entitled to share equally with another child born there after the marriage, but the three children born in England being illegitimate according to the law of England were excluded.

THE testator, Henry Goodman, by his will dated the 23rd January, 1801, gave the rest and residue of his estate and effects of whatever nature or kind whatsoever to trustees upon trust to invest the same as therein mentioned, and to pay the interest in seventh parts or shares to his seven children, whom he named, one to his son Leyon Goodman, for life, respectively; and from and after the decease of any or either of them, then upon trust to stand possessed of so much and such share of the principal or capital of the said residue as should constitute the principal or capital, from whence such deceased child or children's share or shares of the interest thereon arose, on trust to pay the same unto and amongst all and every the child or children of him, her, or them so dying, respectively; if more than one in equal shares, but if but one child then to such only child, to be payable at twenty-one, or in case of females on marriage, and in the meantime to be a vested interest; and upon further trust, in case any of the children of the testator should die without issue living at their death, then to divide the interest and capital of such child unto and equally amongst the survivors, or the issue of such as should be then dead, as therein mentioned.

The testator died on the 1st November, 1812, leaving his seven children in his will mentioned him surviving.

Leyon Goodman, the son whose share was now in question, died on the 17th January, 1832. After his death this suit was instituted by Mary Goodman, afterwards Denis, claiming to be the only child of Leyon Goodman, against Issac Goodman, the executor and son

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of the testator, against Rachel and Harriet Goodman, the two other surviving children of the testator, and three children of a married daughter Elizabeth Van Oven, who died in 1815, praying for administration. The two others, Philip and Mary Goodman, died without having left issue.

In December, 1847, a decree was made in the cause declaring the rights of the parties under the will(*a*).

In July, 1849, the plaintiff married M. D. Denis, of Paris; and in 1857 her husband and the trustees of her settlement presented a petition stating that Isaac Goodman, the son and executor, died on the 11th August, 1856, *not having been married* until the 27th June, 1822, and praying for a distribution of the fund in court accordingly. Evidence was brought forward by persons claiming to be the legitimate children of Isaac Goodman by his lawful wife; and by an order made in the cause on the 16th January, 1857, certain inquiries were directed. The petition came on for hearing in June, 1858, before his Honour, who pronounced in favour of the petitioners; and in December, 1858, an order was made declaring that the persons therein named and specified were the legitimate children of Isaac Goodman, and as such entitled to the share of their father under the testator's will.

Isaac Goodman left his sisters Harriet and Rachel his executrixes. Harriet Goodman died on the 25th February, 1860, having never been married.

An order was made on the petition in the cause, dated the 12th June, 1860, directing inquiries as to whether Leyon Goodman left any or what children surviving, &c. The chief clerk by his certificate, dated the 27th March, 1862, found that Leyon Goodman left five children, all of whom were now living:—Charlotte, born 26th De-

(*a*) See *Goodman* v. *Goodman*, 1 De Gex & Sm. 695.

cember, 1815; Harriet, born 20th May, 1818; Elizabeth, wife of John George Goodman, born 18th March, 1820; Hannah, the wife of Jean Joseph Pieret, born 8th August, 1821; and the plaintiff, the wife of Denis Denis, born the 14th July, 1824. He also certified that Charlotte, Harriet, and Elizabeth Goodman were born in Whitechapel prior to the marriage of their father and mother, and that Hannah Pieret was born at Amsterdam prior to such marriage. The plaintiff Mary Denis was born at Amsterdam after the marriage. He found that Leyon Goodman left England in 1820, "with the intention of permanently residing abroad," and was shortly afterwards followed by his three children then born, and Charlotte Smith their mother, afterwards his wife. He resided at Amsterdam till 1826, and from that date resided, till his death in 1832, at Brussels, and never returned to this country. Charlotte Goodman and the widow were dead, and Hannah Pieret with her husband were still living at Brussels. The chief clerk also certified that on the 27th June, 1822, Leyon Goodman and Charlotte Smith were duly married at Amsterdam, and at that time, "by the said marriage and the proceedings then had, Charlotte, Harriet, and Elizabeth Goodman, and Hannah Pieret, were declared to be legitimate according to the law of Holland."

The petitioner Mary Denis moved to vary the certificate by omitting therefrom the words "with the intention of permanently residing abroad," which she submitted were not within the inquiry directed by the order, and not warranted by the evidence.

The summons was adjourned into court.

The evidence consisted of affidavits by Hannah Pieret, Elizabeth Goodman, and George John Goodman, a son of Isaac Goodman and husband of Elizabeth; William Goodman, another son of Isaac Goodman; all deposing to the fact of Leyon Goodman having left London to

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reside abroad permanently, and to the other facts and dates above mentioned. Several friends of Leyon Goodman, living at Amsterdam, deposed to the same effect.

Madame Pieret by her affidavit deposed as follows:—"By reason of my residence in the kingdom of Belgium, I was totally unacquainted with the laws of England. My cousins have lately been declared by this honourable Court entitled to participate in the estate of the said testator, and it was only on the occasion of their asserting their claim that I first thought I might be interested in the same testator's estate. Acting on their advice, I laid my case before some English solicitors, and am advised by them that I am equally with the above-named plaintiff Mary Goodman beneficially interested under the said will of the said testator, Henry Goodman."

MM. Van Leishout and Van Rinsum, clerks employed at the Greffe of the Tribunal in the *arrondissement* of Amsterdam, proved certain copies of the entries from the register books of birth and marriage, deposited at the registry of the said court; and M. Eugène Somerhausen, advocate, deposed to the truth of the translation of such copies; from which it appeared that the following minutes were deposited at the registry of the Court:—

"On the eleventh day of August, 1800 and twenty-one, at 10 o'clock in the forenoon, was inscribed the birth of Hannah Goodman, born the 8th day of the same month, at 11 o'clock, daughter of Leyon Goodman, without profession, and of Charlotte Smith, husband and wife, of Geldersche Raade No. 25, Canton 2, this child being there born and recognised to be of the female sex."

This act was stated to be witnessed, signed by the father and the two witnesses, and certified according to law by C. Backer de Jonghe, member of the Commission of the Etat Civil of Amsterdam. On the margin of the act was written:—"By the authorisation of the Tribunal of First Instance of this City, given the twenty-first day of June

1800 and twenty-one, the words 'husband and wife' were hereby cancelled in the present act.—(Signed) D. C. VAN EENNEP, Registrar.—The child mentioned in the present act is legitimated by matrimony celebrated in this city the 27th day of June 1800 and twenty-two.—(Signed) D. C. VAN EENNEP, H. J. VANDE POLL, Deputy Registrar.—Seen by us President of the Tribunal of the Arrondissement of Amsterdam for the legalisation of the signature above of H. J. Vande Poll, Deputy Registrar of this tribunal. Amsterdam the 6th August, 1860.—(Signed) PLOOS VAN AMSTEL, Loco Presidis." This last signature was certified by J. G. C. E. Newnham, the British Consul.

The following minutes were also deposited at the same registry:—"This day, the 27th of June, in the year 1800 and twenty-two, at ten o'clock in the morning, appeared before us, M. C. Backer de Jonghe, councillor, and member of the Commission of the Etat Civil of this City of Amsterdam, for the purpose of contracting marriage, Leyon Goodman, of London, without profession, aged forty-two years, living here, son of age, of Henry Goodman and of Hannah Harris, both deceased, of the one part; and Charlotte Smith, of Oakham, in the county of Rutland, England, without profession, aged thirty-one years, living here, daughter of age, of Daniel Smith, absent since many years, and of Elizabeth Beaver, without profession, also living here, of the other part; and the mother of the bride declared to us that she consents to the above-mentioned marriage. The preliminary acts which have been read, together with the chapter 6, on marriage in pursuance of the law of 25 Ventose, year XI., consisting in, firstly, an extract from the registry of the publication regularly made here, the 16th and 25th June last; secondly, the certificate of birth of the bridegroom; thirdly, the certificates of deaths of his father and mother, and of his grandfather and grandmother on each

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side; and fourthly, the certificate of baptism of the bride, at the same time declaring to us on oath, with her mother and the undersigned witnesses, that the father is absent; fifthly, the husband and wife here present, declared to us that they have together begotten and intend to legitimate by this marriage the four following children, of whom three, named Charlotte, born 26th December, 1815; Harriet, the 26th March, 1818; Elizabeth, the 18th March, 1820, according to their declaration, in the parish of St. Mary, Whitechapel, England; and the fourth, named Hannah, born here, as by her certificate of birth, dated the 10th August, 1821. After which we have asked them by their names and separately if they took each other as husband and wife, to which each of them separately answered yes; and we then declared in the name of the law that they were united in marriage; the whole in pursuance of the 3rd chapter of the law of the 20th Ventose, year XI., and in presence of Hermanns Alexander Keyser, brick merchant, aged forty-seven years; Joel Benjamin, tradesman, aged forty-two years; Hurtog Benedictus, commissioner, aged thirty years, all living here. This act has been drrawn up and read by us to the appearers, who have signed with us. (Signanatures) Leyon Goodman, C. Smith, Alex. Hart, H. A. Keyser, Joel Benjamin, H. Benedictus, C. Backer de Jonghe. Delivered on the 6th August, 1860." Signed by the deputy-registrar and by the judge of the tribunal, and certified by the British consul in the same form as above.

M. Somerhausen, and also MM. Julius Pinner and Arnold Carel Cosman, two other advocates, deposed that for many years prior to and after the year 1821 the Code Napoleon was in force throughout Holland and Belgium (then the kingdom of the Netherlands); and that, according to those laws, children born before marriage could be legitimated by the subsequent marriage of their

parents, and declared legitimate in the registry of the marriage of those parents. They also gave it as their opinion that Leyon Goodman, at the time of the birth of Hannah Goodman, and at the date of his marriage, was, according to the laws of the then kingdom of the Netherlands, domiciled in that kingdom.

Statement.

Mr. *Malins* and Mr. *Schomberg*, for the petitioner.—The description of Leyon Goodman in the registry, as "of London," and the fact that he left Amsterdam for Brussels, proved that he did not quit England with "the intention of permanently residing abroad," as the chief clerk had certified; at least, that he was not domiciled in the kingdom of the Netherlands. Then, his domicil being English, the marriage contract fell under the English law, and not only the three children born before the marriage were illegitimate, to whose illegitimacy there was no dispute; but also Harriet, who was the daughter of a domiciled Englishman, though born at Amsterdam. [*Rose* v. *Ross* (*a*), *Countess of Dalhousie* v. *M'Douall* (*b*), *Munro* v. *Munro* (*c*), *Birtwhistle* v. *Vardill* (*d*), *Re Don's Estate* (*e*), *Re Wright's Trusts* (*f*) were cited.]

Argument.

Mr. *Bacon* and Mr. *Speed*, for Madame Pieret, argued that her legitimacy depended on the fact of her father being domiciled in Holland at the date of her birth. This they contended was borne out by the evidence.

THE VICE-CHANCELLOR:—

Judgment.

The certificate of the chief clerk is right, and must be supported. The order will be—It appearing that Leyon

(*a*) 4 Wils. & Sh. 289.
(*b*) 7 Cl. & Fin. 817.
(*c*) Ib. 842.
(*d*) 2 Cl. & Fin. 571.
(*e*) 4 Drew. 124.
(*f*) 2 K. & J. 595.

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Judgment.

Goodman was domiciled in Holland at the time of the birth of Madame Pieret, declare that Madame Pieret and Madame Denis are entitled in equal shares to the funds in question. The costs of all parties to be as between solicitor and client.

BAXENDALE *v.* THE WEST MIDLAND RAILWAY COMPANY.

June 24, 25.

Demurrer to a bill alleging that the defendants having undertaken the duty of carrying goods as common carriers on behalf of the plaintiffs, who were also carriers, instead of delivering them to the plaintiffs to whose care they were addressed at the station, claimed the right to carry them to the customers of the plaintiffs, overruled with costs.

The recent statute 17 & 18 Vic. c. 31, which gives power to Courts of Common Law to grant the preventive remedy, does not by giving a concurrent jurisdiction abridge the jurisdiction of this Court.

THIS was a general demurrer to the bill.

The bill alleged that the plaintiffs were common carriers carrying on business under the style of Pickford & Company, having among others a place of business in the town of Kidderminster. That by virtue of certain Acts certain lines of railway were amalgamated and became the West Midland Railway Company. That after the opening of the railway the plaintiffs continued their business as carriers, but the goods were carried from Bristol to Kidderminster by the said railway company and the Midland Railway Company.

That the defendants, the company, always until the end of December, 1861, delivered to the plaintiffs' servants at the station at Kidderminster the goods so carried by railway, and the defendants, the company, employed the plaintiffs as their agents to cart such goods from the Kidderminster station to the places to which they were directed and consigned. The defendants, the company, charged a through rate for all goods carried on their railway, but they paid or allowed to the plaintiffs a por-

tion thereof for the cartage of such goods from the Kidderminster station.

That the company continued to employ the plaintiffs till the end of December, 1861, when they employed another agent to cart for them.

That after the termination as aforesaid of their agreement the plaintiffs continued to forward goods by the said railway from Bristol to Kidderminster, and various other persons from time to time forwarded to the plaintiffs goods by the said railway, and all such goods respectively were addressed and consigned to the plaintiffs as follows:—"Pickford & Co.," or "Care of Pickford & Co.," Kidderminster.

That when the plaintiffs send goods from Bristol to Kidderminster by railway as aforesaid, they always take to the Bristol station on the Midland Railway a forwarding note, and deliver the same to the officer or servant of the company at such station in the following form, the place of destination being written in ink and the rest being printed:—

"160 Bristol 186

"To the Midland Railway Company.

"Please forward in good condition as received the undermentioned goods to the care of PICKFORD & Co.

KIDDERMINSTER STATION.

Name.	Residence.	Species of Goods.	Weight.	Charges.

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That at the junction of the two railways, the Midland Railway Company deliver to the defendants the trucks containing the goods, which are then carried by the defendants in the same trucks to the Kidderminster station, and together with each truck conveying goods upon their said railway to the Kidderminster station the defendants receive an invoice of all the goods conveyed by such truck, containing the names of the sender, of the consignee, and of the person, if any, to whose care the same are sent, with various other particulars relating thereto.

That the defendants almost daily receive considerable quantities of goods at the Kidderminster station, the invoices whereof shew by the letters "P. & Co." (being the initials of the plaintiffs' said firm of Pickford & Co.) marked against such goods in the column in the said invoices under the head "to whose care," that such goods are consigned to the plaintiffs. In addition to which notice, a label bearing the words "Pickford & Co. Kidderminster," legibly printed thereon, is affixed to all or the greater number of such goods. And the plaintiffs send their servants to receive the same, and are able and ready and willing to remove, by their servants, and demand the same from the defendants at the Kidderminster station, and the defendants ought to deliver the same there to the plaintiffs or their servants; and in particular, since the 18th day of March last (from which time the plaintiffs' manager at Kidderminster has daily received, in due course of post, information of all goods sent from Bristol to the Kidderminster station), the plaintiffs' servants have daily demanded from the defendants the goods which they knew ought to have arrived for them at the said station, and at other times their said servants have demanded goods whereon they saw the labels so marked "Pickford & Co., Kidderminster," as aforesaid.

That the defendants, however, notwithstanding such

demand so made as aforesaid, have always, since the end of December, 1861, refused, and they still refuse to deliver to the plaintiffs at the Kidderminster station the goods so consigned to them at Kidderminster, and insist upon their alleged right to cart and deliver the same by means of their new agent, and have, in fact, carted and delivered the same, and continue to cart and deliver the same from their said station to the various places to which they were and are directed, although they are consigned to or to the care of Pickford & Co., and the defendants have thereby deprived the plaintiffs of the profit which they ought to receive for the cartage and delivery of the said goods so as aforesaid consigned to them at Kidderminster.

That many goods are sent by the said railway to Kidderminster consigned to or to the care of Pickford & Co., but "under mark" (that is to say) the names of the persons to whom the same are to be delivered by the plaintiffs' firm of Pickford & Co. are not written on the addresses or directions, but instead thereof there are initials or other marks by which the same are identified, and the plaintiffs send by post to their manager at Kidderminster the names of the persons to whom the said goods are to be delivered; but the defendants nevertheless have always refused and do refuse to deliver up to the plaintiffs at the Kidderminster station such last-mentioned goods, until they have first carted the same by their new agent into the town of Kidderminster, and tendered them for acceptance by the plaintiffs at the plaintiffs' place of business in the said town, although the plaintiffs have always refused to receive the same there, and have required that the same should be delivered up to them at the defendants' said station; the defendants nevertheless have persisted in refusing to deliver such goods at once to the plaintiffs at the said station, and have continued to cart the same by their said agent into the said town, and to tender the same to the plaintiffs for acceptance at their said place of busi-

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ness in the said town, although they well knew that the plaintiffs would refuse to accept the same there, after which refusal the defendants carted the said goods back to their said station where they have been then at last delivered up to the plaintiffs.

That the defendants have thereupon refused to make any allowance to the plaintiffs from their through rates for cartage, and have charged the plaintiffs for the cartage of the said goods to the plaintiffs' said place of business in the said town of Kidderminster, for acceptance there, although the defendants had had notice and well knew at the time they so carted the same that they would have to cart the same back and deliver them up to the plaintiffs at their said station, and the defendants have thereby deprived the plaintiffs of the profit which they ought to receive for the cartage and delivery of the said goods so as aforesaid consigned to them at Kidderminster, and the plaintiffs have been compelled to pay, and have paid, for the cartage, but they have done so under protest.

That in consequence of the defendants so persisting as aforesaid (notwithstanding repeated verbal notices to them and to their said agent that the same would not be received anywhere but at the said station) to cart into the town of Kidderminster and to tender to the plaintiffs for acceptance there all such goods as aforesaid, which were addressed to the plaintiffs' said firm of Pickford & Co. only, and which the defendants were therefore unable to deliver to the ultimate consignees thereof, the plaintiffs, on the 15th day of March last, wrote and sent to the defendants a formal notice in the words and figures following (that is to say):—

"West Midland Co. Kidderminster.

"Pitts Lane, Mill St. Kidderminster, March 15th, 1862.

"GENTLEMEN—Consigned goods — Please note that we shall require all goods consigned to care of Pickford &

Co. or Pickford & Co. arriving with you to be delivered to our carters at your station, who will hold instructions for delivery, as in no case will they be received at the above address if tendered after this notice.

"Yours resply.

(Signed) "Pro Pickford & Co.

"J. MALIN."

That by their said conduct, in carting and delivering as aforesaid goods consigned to the plaintiffs, and in refusing to make any allowance for cartage in respect of the goods so as aforesaid tendered by them in the first place to the plaintiffs at the said place of business in the said town of Kidderminster as aforesaid, the defendants not only deprive the plaintiffs of the actual profits which they ought to have received from the cartage and delivery of the same respectively, but they also have seriously injured the plaintiffs in the way of their trade as such common carriers at Kidderminster, and have considerably reduced the same, and such conduct will, unless it be restrained by the order and injunction of this Honourable Court, eventually destroy the plaintiffs' said trade, and compel them to relinquish their said establishment at Kidderminster, with which town the plaintiffs' said firm of Pickford & Co. has as aforesaid been connected for upwards of thirty years.

That in consequence of the defendants so refusing to deliver to the plaintiffs the goods consigned to them, the plaintiffs on the 19th day of February last wrote and sent to the defendant W. T. Adcock, the secretary to the company, a letter of that date, as follows:—

"London, Feb. 19th, 1862.

"SIR,—We are daily in the habit of sending from the Midland Companies' station at Bristol to yours at Kidderminster sundry goods consigned and labelled to ourselves,

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but your company, instead of redelivering them to us, have wholly disregarded the said consignments and labels and delivered the goods themselves to our customers. We are advised that we are entitled to have those goods delivered to us by the company at the aforesaid station and to be allowed by the company from the through rates the cost of their delivery in Kidderminster; we therefore call upon you to give the necessary directions at once for having this done, and unless we hear from you within seven days that our request has been complied with we shall instruct our solicitors to take such steps as they may advise to place us in a proper position.

"We are Sir, your obedt. servts.

(Signed) "PICKFORD & Co.

"W. T. Adcock, Esq.

"West Midland R'way, Worcester."

That the plaintiffs received the following reply:—

"West Midland R'way,

"Secretary's Office, Worcester,

"Feb. 26th, 1862.

"GENTLEMEN,—I have to acknowledge the receipt of your letter of the 19th inst. which has been submitted to the directors. I am instructed to inform you that this company, being responsible for the due conveyance and delivery of goods consigned to places on their line, have made their arrangements for ensuring such delivery by themselves and their own agents, and their present regulations at the station you refer to do not admit of its promiscuous use by the parties. Any goods consigned to you at any place beyond the precinct of the station will be duly delivered by the company at such place. The directors cannot consent to make you any allowance from their rates not made to other consignees.

"I am, Gentlemen, your obedient servant,

(Signed) "W. T. ADCOCK, Secretary.

"Messrs. Pickford & Co., Carriers, London."

The bill then set forth a correspondence between the plaintiffs and the defendants, and alleged that the plaintiffs, being still unable to obtain the delivery of the goods consigned to them, thereupon placed the matter in the hands of their solicitors, Messrs. Uptons, Johnson and Upton, who on the 1st day of May instant wrote and sent to the defendants a letter of that date as follows:—

"To the Directors of the West Midland Railway, Worcester.

"20, Austin Friars, 1st May, 1862.

"GENTLEMEN,—We have been instructed by Messrs. Pickford & Co. to take legal proceedings against you to put a stop to the illegal course you are pursuing, notwithstanding their remonstrances, with regard to goods consigned to them, by your carting such goods to the customers of theirs for whom such goods are intended instead of delivering such goods to Messrs. Pickford & Co. The consequence of this course is, that you deprive them of the profit they would obtain by carting the goods themselves to their customers, and appropriate such profit to yourselves, besides injuring their trade as carriers. It seems to us that Messrs. Pickford & Co. are entitled to an injunction from the Court of Chancery to prevent you from continuing the practice, as well as to damages for the loss of profit and for injury to their trade, and unless the practice is discontinued by Saturday next legal proceedings will be taken against you without further delay.

"We are, GENTLEMEN,

"Your obedient servants,

(Signed) "UPTONS, JOHNSON, & UPTON."

That the defendants have not sent any answer to the last-mentioned letter, and they have not discontinued the said practice; on the contrary, they still refuse to deliver

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up at their said station the goods consigned to the plaintiffs at Kidderminster, and instead thereof they continue to cart and deliver the same by their said agent to the plaintiffs' customers, and thereby continue to deprive the plaintiffs of the profits of the said cartage, amounting daily to a considerable sum of money, and to injure the plaintiffs as aforesaid in their trade.

That the defendants also continue to cart into the said town of Kidderminster, and to tender at the plaintiffs' said place of business there, all goods which, being "under mark" as aforesaid, they are unable to deliver themselves to the plaintiffs' customers, and they continue to refuse to allow to the plaintiffs cartage for the same, and thereby also deprive the plaintiffs of a considerable sum of money which the plaintiffs ought to receive in respect of the said goods, and thereby to injure the plaintiffs in their trade.

That the plaintiffs have from the 13th of May instant been in the daily or constant practice of sending goods from the Paddington station of the Great Western Railway to the Witney station of the West Midland Railway, addressed or consigned to Pickford & Co. at the Witney station, and marked as aforesaid with a label bearing the words "Pickford & Co., Witney Station," legibly printed thereon.

That a similar practice with respect to goods sent to Witney, as aforesaid, has been used as that which, as hereinbefore mentioned, has been used with respect to goods sent from Bristol to Kidderminster.

That the defendants, instead of delivering to the plaintiffs' servants at the Witney station the goods so addressed or consigned as last aforesaid, have always refused to deliver them at the station, and have delivered through their own carting agents to the plaintiffs' customers such of the goods as had upon them the names and addresses of the customers, and have by their own carting agents

tendered at the establishment of the plaintiffs' agent in the town of Witney the goods which were "under mark," or on which the names and addresses of the customers did not appear, notwithstanding the plaintiffs have through their agent at Witney refused to receive the goods at the said establishment in the said town, and in all the cases the defendants have refused to allow to the plaintiffs the cartage out of the through rate charged by the defendants.

That the defendants by such conduct as last aforesaid not only deprive the plaintiffs of a considerable sum of money which the plaintiffs ought to receive in respect of goods addressed or consigned to them as last aforesaid, but also thereby seriously injure the plaintiffs in the way of their trade as such common carriers, as aforesaid, at Witney; and such conduct will, unless restrained by the order and injunction of this Honourable Court, eventually destroy the plaintiffs' said trade, and compel them to relinquish their said establishment at Witney.

The bill prayed that it may be declared that the defendants are bound to deliver to the plaintiffs at the Kidderminster and Witney stations respectively all goods consigned to Pickford & Co. or care of Pickford & Co. at Kidderminster and Witney respectively, whether consigned by the plaintiffs themselves or by other persons.

That it may be declared that the said defendants are bound to deduct from the sum charged by them as a through rate for goods carried upon their said railway to the Kidderminster and Witney stations respectively, and carted and delivered by them from their said stations, a reasonable sum for cartage on all goods consigned to Pickford & Co., or care of Pickford & Co., at Kidderminster and Witney respectively, and to allow the same to the plaintiffs.

The bill then prayed for an injunction and account on the principle of the bill.

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Mr. *Bacon* and Mr. *Jessel* for the demurrer.—The object of this bill is to obtain a declaration that the railway company is bound to deliver the plaintiffs' goods at the Kidderminster and Witney stations; but it appears from the bill itself that it is the duty of the defendants to deliver goods. not at the station, but to the consignees. This is exactly what the bill alleges defendants have done. The real grievance is that the company employ another agent instead of Pickford and Company. The bill does not pretend that the defendants are bound to warehouse their goods, or to allow the plaintiffs to use their station. There is no law to compel a railway company to carry in any way a customer may desire. The plaintiffs, moreover, are under no obligation to send their servants for the goods when they arrive at the station. The defendants simply did their duty, and had fulfilled their contract with the consignors. The plaintiffs' remedy is not in this Court; and even if it were, the nature of the relief is not such as a court of equity could grant. Again, it is not alleged that the defendants intend to commit a breach in future, or of any contract between the plaintiffs and defendants. The questions as to which the declaration was prayed were all legal rights, and the injunction should have been applied for at law under the 3d section of the 17 & 18 Vict. c. 31; *Parker* v. *The Great Western Railway Company* (*a*). If there be no remedy at law there is clearly none in this Court. Moreover, it is impossible to prohibit by injunction a company from breaking a contract before it exists; *Johnson* v. *The Shrewsbury Railway Company* (*b*), *Lumley* v. *Wagner* (*c*), *The Bristol and Exeter Railway Company* v. *Collins* (*d*), were cited.

(*a*) 7 M. & Gran. 253.
(*b*) 3 De G. M. & G. 884, 931.
(*c*) 1 De G. M. & G. 604.
(*d*) 7 H. L. 194.

Mr. *Malins*, Mr. *Dickinson*, and Mr. *W. H. Birley* appeared in support of the bill, but were not called on.

The VICE-CHANCELLOR:—

The question to be decided now is, whether, assuming the allegations in the bill to be true, the Court can safely come to the conclusion that the plaintiffs are not entitled to any equitable relief. In order to sustain a bill against a demurrer, it is not necessary to show that the plaintiff is entitled to every part of the relief prayed. The defendant who demurs must show that the case stated is destitute of any ground whatever for relief in equity. The substance of the case made by the bill is that the defendants undertook the duty of carrying the goods, but neglected the duty of properly delivering them. The allegations go to this extent, that the defendants refuse to deliver the goods to the plaintiffs, to whose care they are addressed, and insist upon delivering them to other people. Upon such allegations it seems difficult to say that there is not a ground for some relief in a court of equity. As to the class of goods called "under mark," it would be a great deal too much to say that, if at the railway station to which they are addressed the plaintiffs send their servants to receive them, and the defendants refuse the delivery to persons properly authorized to receive them, there is no ground for equitable relief. Some observations were very properly made upon the difficulty which the Court sometimes experiences in the application of the preventive remedy, and that a case of this kind is not a case in which the preventive remedy is applicable. But it is a mistake to say that the preventive remedy is only applicable to a case where the Court can direct the complete performance of the whole of the contract. The recent statute which gives power to Courts of Common Law to grant the preventive remedy cannot by giving a concurrent jurisdiction abridge the jurisdic-

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tion of this Court. Nor is the case of the defendants on this demurrer fortified by the argument that the Legislature did, with reference to the violation of the duties of railway companies as carriers, and with regard to their traffic, contemplate and did authorize a summary relief by way of injunction to prevent a violation by railway companies of their duties as carriers. As the bill alleges that the defendants are carriers of goods for hire, that is a sufficient allegation that they are common carriers. I think the case stated is such as cannot justify the Court in allowing a demurrer.

Demurrer overruled.

Feb. 26, 27.
July 1, 2.

PERKS *v.* THE WYCOMBE RAILWAY COMPANY.

A railway company, under the misapprehension that a tenant for life was owner in fee of certain land, entered into an agreement with his supposed agent under the 84th section, and took possession of the land, on which they constructed their railway.

THIS bill was filed by the mortgagees and the second tenant for life of certain lands at Towersey, which had been taken by the Great Wycombe Railway Company under the powers of their Act of 1846 and Extension Act of 1857, praying that the defendants, their agents, &c., might be restrained by injunction "from continuing in possession of or otherwise intermeddling with the pieces or parcels of land described (in the notice of motion) in the alleged agreement, or any part thereof, and from carrying on any railway or other works in or upon the said pieces of land and hereditaments, or any part thereof, until

On a bill by the remaiudermen and mortgagees the Court granted an injunction to restrain the company from retaining possession of the land.—*Deere* v. *Guest*, 1 M. & G. 516, considered.

Semble, the 68th section of the Land Clauses Act does not apply to cases where a company have, under a mistake, wrongfully taken possession of the land.

the value thereof and the compensation which ought to be paid in respect of the purchase thereof to every person having any interest therein had been properly ascertained or agreed upon and paid or deposited."

Statement.

The facts were these. In October, 1857, Mr. Philip Hickin the elder, the tenant for life, was served with a notice, on behalf of the company, of their intention to take the lands in question; on the 13th January, 1859, an agreement was signed by George Vernon, the agent of the company, and one John Clarke, subscribing himself "as the agent to Philip Hickin," whereby it was purported that Philip Hickin agreed to sell, and the company, by their agent, agreed to purchase, at the price of 300*l.*, the lands therein described and also mentioned and set forth in the schedule, "with all mines, minerals, easements, and appurtenances thereto belonging." The vendor further agreed to make a good title "as freehold of inheritance in fee simple in possession, and free from incumbrances," and to deliver an abstract of title when required. Possession of the land was to be given on payment of the purchase-money, including compensation for the entire value of the land, and for all damage done to the remaining estate of the vendor by severance or otherwise." In case the company required to purchase more land of the vendor, they were to be entitled so to do at the same rate per acre as that at which the above-mentioned lands were sold. The agreement further provided, that "if from any disability or incapacity, the vendor should not have power to sell and convey the said land and premises, except under the provisions of the several Acts in that behalf mentioned, the amount of the purchase-money and compensation should be ascertained and determined by George Vernon, nominated on behalf of the said company, and John Clarke, nominated on behalf of the vendor (practical surveyors or their umpire) pursuant to the said Acts."

By the original Acts of the company the Lands

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Clauses and Railway Clauses Acts were incorporated therein.

In August, 1859, Mr. Hickin the elder wrote a letter to Messrs. Baxter, the solicitors of the company, in which he said, "My life interest in Towersey, Bucks, is from my late wife's will, then to the children. Mr. Hawksford, solicitor of Mr. Hampton, has the will, he having made it. Whatever value is adjusted to me, I should like to take shares for the same. But I ought to have an opportunity to show its value on evidence." On the 3rd September, 1859, Mr. Hickin, sen., repeated to Clarke his intention to invest the money in shares in the defendants' undertaking.

On the 18th January, 1860, thirty share certificates of 10*l.* each, representing 300*l.*, were sent by Mr. Wilson, the secretary of the company, to Mr. Hickin, who, in reply, suggested that the value of the holding should be ascertained.

On the 17th February, 1860, the company took possession of the land, without having the value ascertained under the 9th section of the Lands Clauses Act, and without having paid any purchase-money or deposited any compensation in the bank under the 84th section. They constructed the railway on the land, and had remained in it ever since. Mr. Wilson deposed that at this time the company had no knowledge "that any person or persons other than Mr. Hickin the elder and his children was or were interested in the lands." No abstract of title or statement of claim was received from or made by the plaintiffs or either of them, until the filing of the bill.

The land was, by indentures of the 1st and 2nd May, 1840, settled to such uses as Elizabeth Hickin should, by deed or will, whether covert or sole, appoint. On the 13th August, 1840, Mrs. Hickin appointed the lands by way of mortgage to secure a debt of 2000*l.* and

interest, which debt, on the 12th August, 1858, became vested with the securities in the plaintiffs Messrs. Perks and Shaw. Mrs. Hickins died in June, 1854, having by will appointed the lands to her husband Philip Hickin the elder for life, "with full power for him and his assigns to raise and dispose of all or any part of the mines lying in or under the premises, for his or their absolute use;" and after his decease she appointed one fourth share to her son the plaintiff Philip Hickin the younger, and his assigns, during his life, with remainder after his decease to his children as tenants in common; and with a limitation over to her other children, James Hickin, Mary Hickin, and Theresa Hickin (afterwards the wife of Francis Whitgreave), and their respective heirs and assigns as tenants in common, in case of default of issue of the plaintiff Philip Hickin the younger, or in case such issue should die under twenty-one, or without living to take a vested interest under the foregoing limitation. He also appointed the three other undivided fourth parts of the said hereditaments to her other three children respectively for life, with remainder to their children, and like limitations over in default of issue as aforesaid.

Subsequently a question was raised between Mr. Hickin and the company about the quantity of land, and about a right of way to a portion of the reserved land; and on the 5th July, 1860, Messrs. Baxter, the company's solicitors, wrote to say that they had referred to the company's engineer in the matter, and found that the precise widths and quantities agreed for had been taken; also that the land in question was contracted to be sold by him (Mr. Hickin), including severance, and that no crossing was agreed to at the point he indicated.

On the 6th July, 1860, Mr. Hickin wrote as follows:—"I never agreed to sell the land at Towersey, or engaged any one to do so. I should never allow any one

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to take away the land which neither railway nor self can get at. It is out of all reason. You may just as well have sunk it in the sea as have no road to it, and inconsistent in every way. I hope you will not oblige me to employ a solicitor in the affair, as we must have a road into the piece, unless the railway company forfeits 500*l.* down."

A long correspondence ensued between the solicitors of the parties, the substance of which was that Mr. Hickin the elder repudiated the authority of the supposed agent.

On the 16th April Messrs. Baxter, on behalf of the company, wrote as follows:—"We are now in possession of indubitable proof that ample authority was given by Mr. Hickin to Mr. Clarke to enter into the contract of the 13th January, 1859, the terms of which the company are prepared to comply with, and they require the fulfilment of it by Mr. Hickin. We have therefore again to request you will be good enough to furnish us with an abstract of the title of Mr. Hickin, prepared in accordance with the note at the foot of the contract. Mr. Hickin, having agreed to sell on behalf of himself and all persons having any estate or interest in the property, is of course bound to obtain the concurrence of all requisite parties to the conveyance."

On the 23d May, 1861, Samuel Perks, Edward Dethick Shaw, and Philip Hickin filed this bill against the company only, alleging that there was a valuable bed of clay under the land, and that the sum of 300*l.* mentioned in the alleged agreement was a grossly insufficient price, independently of the several items of compensation in the agreement mentioned. The agency of John Clarke was absolutely denied, and the bill prayed for an injunction in the terms above stated. The earthwork of the line was completed before the filing of the bill.

Numerous affidavits were filed, of which the material parts were as follows:—

John Clarke, by an affidavit filed on the 15th June, 1861, on behalf of the company, deposed that he was

a land agent and surveyor at Haddenham, Oxfordshire, and that in July, 1855, he applied to P. Hickin, senior, whom he had known for many years, to employ him (deponent) in valuing his lands at Towersey required by the company. Mr. Hickin wrote as follows:—"July 27, 1858. Dear Sir,—I am grateful to you for your application, and as soon as I see what the Act of Parliament and the direction of the authorities require I will let you know. . . . I suppose I shall be obliged to have evidence from here to show the value of the clay, as it was tried here. I should like it to be tried also in the neighbourhood."

On the 21st August, 1858, he wrote to Mr. Hickin, senior, on the subject of the valuation, by the direction of Mr. Hickin's bailiff, since deceased; and on the 3rd of September, 1858, he received an answer as follows:—"Dear Sir,—I had concluded to have applied to you independent of any other person, and as soon as I have ascertained the necessity I shall apply to you." In November, 1858, Mr. Bowden met the deponent at Thame, and gave him, as he believed, instructions from Mr. Hickin to value the land. Accordingly he proceeded to value the land at 300*l.*, and entered into the agreement with Mr. Vernon on that valuation.

In an answer, filed 7th October, 1861, to interrogatories filed by the defendants in their suit, the plaintiff Philip Hickin, jun., set forth two letters which he had received from his father, one of which, dated 30th August, 1860, was as follows:—"Dear Philip,—I wrote some time since, and refused my signature to secure the railway company their possession; and it is well, as you are there and likely to see some of them, to know I never appointed any one to value for me. Mr. Clarke, of Haddenham, wrote to me to ask me to appoint him, as Mr. Griffin had fixed upon him. I wrote him word that if I appointed any one I meant to appoint him. I kept back for fear it may set others on to find out the value of any mines they

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may have, so as to make a demur with the company." The mortgagees, who were also plaintiffs, admitted that that the remaining parts of the lands comprised in the indenture of the 13th August, 1840, were, in their opinion, a sufficient security for the money charged thereon, but they nevertheless believed it to be their duty, as trustees, to resist the sale of any part of the lands at an undervalue.

On the 4th of July, 1861, the company paid 300*l.* into the bank, and shortly afterwards served the mortgagees with notice to treat for their interest under the 124th section of the 8 & 9 Vic. c. 18 (*a*), and on the 23rd of November following they gave notice to the mortgagees of their intention to summon a jury. On the 16th December, 1861, the mortgagees served on the company a notice of their title; but no further steps were taken.

The cause came on for hearing on the 9th November, 1861, but was ordered to stand over, with liberty to amend, and the bill was amended by adding certain defendants.

The company in the mean time having filed a bill against Hickin the elder for specific performance of the agreement to sell the land, his Honour, when the cause of *Perks* v. *The Wycombe Railway Company* came on for hearing, ordered it to stand over, and to come on with the suit instituted by the company (*b*). The railway company subsequently presented a petition at the Rolls Court that that suit might be dismissed with costs. The original suit now came on upon a motion for a decree.

(*a*) In this section of the Lands Clauses Consolidation Act the promoters of undertakings are empowered to purchase interests in lands of which the purchase is or may be omitted by mistake.

(*b*) The defendants appealed against this order, but the Lords Justices, on the 28th May, 1862, dismissed the appeal with costs, on the defendant undertaking to accept notice of motion for a decree in a week.

Mr. *Greene* and Mr. *Fisher*.—It is not disputed that the railway company might have proceeded under the 7th and 9th sections of the Lands Clauses Consolidated Act, and might have acquired the land on a contract with the elder Hickin; but, instead of taking that course, they had thought proper to treat with him as owner in fee simple, instead of treating him as a person having a limited interest. It was clear therefore, in the view of the case most favourable to the railway company, they were in possession under a title which Hickin the elder had no power to confer; in other words, they were mere trespassers. The payment of the money into court was not a payment within the scope of the 24th section.

Again, the agency of Clarke was totally denied, and the Court must assume was truly denied, inasmuch as the company had admitted that their bill for the specific performance of the agreement was unsustainable: *Blore* v. *Sutton* (*a*), *Broadbent* v. *The Imperial Gas Company* (*b*), were cited.

Mr. *Speed* and Mr. *R. E. Forster* appeared for defendants in the interest of the plaintiff.

Mr. *Malins* and Mr. *C. Locock Webb* for the company.

The agency of Clarke was fully established, and the agreement was therefore binding on Philip Hickin the elder; but, even if there had been a mistake, it was cured by the proceedings under the 124th section. But, for the purpose of defence to the present suit, it was wholly immaterial whether the agreement was valid or invalid. The company had been let into possession by the person entitled to the rents and profits, and it was too late now to apply to the Court to restrain possession which had been held for nearly two years. In such cases the Court

(*a*) 3 Mer. 237. (*b*) 7 H. of L. C. 600.

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always looked to the balance of inconvenience. The plaintiffs ought to have stated what they claimed in respect of their interest, which they had refused to do; and their remedy was clear under the 68th section, under which the compensation, if any, to which they were entitled might be ascertained: *Adams* v. *The Blackwall Railway Company* (*a*). The mortgagees were most unnecessary parties, and had it not been for their presence the bill would have been demurrable. [*Carnochan* v. *The Norwich and Spalding Railway Company* (*b*), *Webster* v. *The South Eastern Railway Company* (*c*), *Deere* v. *Guest* (*d*), *Webb* v. *The Manchester Railway Company* (*e*), were cited.]

Judgment.

THE VICE-CHANCELLOR:—

This cause stood over under an order of mine, confirmed by the Lords Justices, that it should be heard with another cause then pending of *The Wycombe Railway Company* v. *Hickin*. But, instead of bringing on that cause the railway company, who were plaintiffs, voluntarily dismissed the bill with costs. The existing facts are these. The railway company claim to hold the land, which the plaintiffs have shown to belong to them under an agreement alleged to have been made between the defendant and Philip Hickin the elder, who, within the knowledge of the railway company, had only a limited interest in the land. Philip Hickin the elder denied the validity of that agreement. The company, therefore, filed their bill against him to enforce the agreement; but now it appears they have thought it safer to pay him his costs and to dismiss their bill.

In that state of things the company are found in pos-

(*a*) 2 M. & G. 118.
(*b*) 26 Beav. 169.
(*c*) 1 Sim. N. S. 272, 29.
(*d*) 1 Myl. & C. 516.
(*e*) 1 R. C. 576.

session of this land, and have constructed their works to a great extent upon it, without any right whatever to the possession of the land. As appears from the answer of Philip Hickin the elder to the dismissed bill possession of the land was taken without his leave. In the 16th paragraph of his answer he says, "I deny that I ever did, either in part performance of the said alleged agreement of the 13th day of January, 1859, or in fact, let the plaintiffs into possession of the whole or any part of the said land in the bill described." It is true there appears to have been a misapprehension on the part of the railway company. A person named John Clarke assumed to act as agent, duly authorised by the defendant Philip Hickin the elder to sell the land in question to the company for the sum of 100*l.*; but on the result of the evidence it is clear that Clarke had no authority whatever to enter into the agreement, and the railway company must have been satisfied of this fact, or they would not have dismissed their bill for the performance of the agreement.

Still, the railway company are in possession of this land, and have held it since the beginning of the year 1860, without having paid the 300*l.* mentioned in the agreement. They say that instead of money they gave some shares in this company, which were handed to Philip Hickin the elder, who says that he is ready and willing to give them back whenever they please. In short the railway company are now in possession of the land without having paid anything to any person for the land which they have taken and now hold.

It appears distinctly from the evidence of the secretary of the railway company that before the alleged agreement was entered into the railway company were informed that Hickin the elder was not the absolute owner of the land, but that other persons were entitled, and that his interest was a limited interest only. An attempt has been made on the part of the com-

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pany by their counsel to say that the railway company are now rightfully in possession of the land; that they do not deny the right to compensation, and that the plaintiffs, instead of filing the bill in this cause for an injunction until compensation is made, ought to have proceeded under the 68th section of the Lands Clauses Act, to have the compensation ascertained in the manner therein directed. During the argument I asked whether it had ever been held that the 68th section of the Lands Clauses Act applies to the case where compensation is sought in respect of the whole interest in the land. What seems to have been contemplated by the 68th section of the Act is a remedy to persons who have some limited interest in the land where the land has been lawfully taken by the company. I can discover no ground for holding that the word "taken" by the company means taken either rightfully or wrongfully — taken under a proper authority or taken without any authority at all. That construction seems to me in no way warranted, and no authority has been cited to justify the Court in putting such a construction on the word "taken" in the 68th section. If the railway company, as the plaintiffs have proved, are in possession of this land under a mistake as to the authority under which the possession was taken, they are not rightfully in possession of the land. In my opinion the 68th section applies only to cases where the company must be rightfully in possession, and where compensation is sought by persons having a limited interest.

The situation of the railway company, therefore, is this, that, no doubt under a mistake on their part, but a mistake which they discovered long ago, they are in possession of the land of the plaintiffs and the other defendants without any lawful title whatever.

The case of *Deere* v. *Guest* has been referred to as an authority to show that Lord Cottenham decided that

this Court will not interfere by injunction to restrain the use of works constructed on land which has been taken possession of, where that possession has been obtained even by fraud. The marginal epitome of the report of that case is inaccurate. There is not one word Lord Cottenham's judgment to justify so extraordinary a proposition as that this Court will not interfere against a possession fraudulently taken, whether the works are constructed or not. Looking at the report of Lord Cottenham's judgment, the grounds of it are plain. The case was decided on demurrer, and the only question was whether, on the allegations in the bill, there was enough to show that the plaintiff would be entitled, on the case stated in his bill, to relief in a court of equity; and Lord Cottenham thought not, because what the defendants claimed was simply a right of way, and the case stated by the bill was a case of mere trespass, and upon that ground, on demurrer, he affirmed the judgment of the Vice-Chancellor of England, by which the demurrer was allowed.

In the present case the company being wrongfully in possession, the plaintiffs seem to be entitled to the injunction which they ask, to restrain the company from longer continuing improperly in possession of that land which they have taken until they have made compensation. During the argument, I have said that this railway company in the present state of the cause are acting unreasonably, oppressively, and unjustifiably. I observe, too, that upon the appeal made against the order which directed the standing over of the cause, one of the Lords Justices expressed himself in strong terms with respect to that appeal by the company, characterising it as a vexatious, improper, and unjustifiable appeal.

The plaintiffs very properly, at the outset of the case, offered to take 600*l.*, which, although it is double the amount stated in the agreement, seems, after all, not a

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very high rate of compensation for the land. They offered, if that amount was objected to, with a view to save expense and delay, to go into chambers and have the proper sum to be awarded for compensation ascertained. These offers were refused. The proper decree to be now made, therefore, is as follows :—

It appearing that the defendants the Wycombe Railway Company have obtained an order, dated the 31st May, 1862, by which the bill filed by them against Philip Hickin the elder, one of the defendants in this cause, has been dismissed with costs, and the plaintiffs and all the defendants except the company concurring in an offer to accept 600*l.* in full for compensation money, or to have it referred to the judge in chambers to ascertain what sum is proper to be paid by the defendants the company, as compensation in respect of the lands in the pleadings mentioned, which offers have been refused by the defendants the company, &c., there will be an order for an injunction according to the prayer of the bill. The costs of the plaintiffs and all the defendants except the company, to be taxed, and the plaintiffs to pay the amount of said defendants, costs when taxed, and the defendants the company to pay to the plaintiffs the whole amount of their costs, including what they shall have paid for the costs of the other defendants. Liberty to apply.

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BAMFORD *v.* CREASY.

July 9, 10.

On a bill by a tenant for relief who had allowed judgment in ejectment to go by default, the Court relieved against the judgment, on payment by the plaintiff of the taxed costs at law, the arrears of rent, the amount due for repairs and insurance, and 50*l.* costs in equity, and ordered the defendant to account for the rent. *Hill* v. *Barclay*, 18 Ves. 56 observed on.

BY an indenture of lease, dated the 13th of November, 1854, a plot of land and four unfinished houses, now known as Nos. 2, 3, and 4, Wilton Terrace, Old Ford Road, Stratford, Bow, were demised by one James Brown to Joseph Higgs, a builder, for a term of 100 years from Lady Day, 1854, at an annual rent of 9*l.* The lease contained the ordinary covenants by the lessee to pay the rent quarterly, on the four usual quarter-days; to pay "all rates, taxes, duties, assessments, and outgoings to be charged on the premises, or on the lessor in respect thereof," except property or income tax; to finish the houses according to a specification; to contribute towards the expenses of party walls, sewers, ways, &c.; to repair, maintain, and keep in repair, and to yield up the property at the end of the term. The lessee further covenanted to keep the premises insured in the Guardian Fire Office, or such other office as the lessor should appoint, in the joint names of the lessor and lessee, and upon every request of the lessor to produce the policy and receipt. Liberty was reserved to the lessor, at all reasonable times, to enter and examine the premises, and it was agreed that "all wants of reparation, and of fixtures, or other things which upon any such views should be found, and for the amendment or replacement of which notice in writing should be left on the premises, the lessee would, within three calendar months after such notice, well and sufficiently repair and make good the same;" there were also the other usual covenants in a lease of property of

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that description. The lease also contained a proviso for re-entry in case the rent should be unpaid for fifteen days after the days appointed, or in case of the breach or nonperformance of any of the covenants on the part of the lessee.

By an assignment of even date, viz., 13th of November, 1854, the premises were assigned by Joseph Higgs to Thomas Halfpenny for the whole residue of the term, subject to payment of the rent and observance of the covenants.

In March, 1856, the defendant John Creasy purchased the same houses in fee simple subject to the then subsisting leases.

By another assignment of the 1st of May, 1860, in consideration of 470*l.* paid by the plaintiff Elizabeth Margaret Bamford, spinster, to Thomas Halfpenny, the premises were assigned to the plaintiff for the whole residue of the term, subject as aforesaid, &c.

The houses were completed according to the agreement, and up to the 1st of May, 1860, the covenants for payment of rent, insurance, and repair, and all others, were duly performed.

The plaintiff, Miss Bamford, deposed that a year's ground-rent of 9*l.* up to the 25th of March, 1861, being due, on the 30th of April following she called at the residence of the defendant John Creasy, who she had been informed was entitled to give a discharge for the same, for the purpose of paying the rent, and was told that Mr. Creasy was from home. She left word with the servant that she had come to pay the rent.

On the 6th of May, 1861, she paid to the Guardian office the premium of 1*l.* 7*s.* for insurance.

On the 20th of June, 1861, as the plaintiff deposed, she was informed that one Turney had in his possession a printed paper which he had found affixed to her late resi-

dence in the Whitechapel Road. Having obtained possession of this paper, she showed it to her solicitor, who found it was a copy of a writ in an action of ejectment.

The action was commenced by the defendant against the said T. Halfpenny and the plaintiff on the 11th of May, 1861. Judgment was signed on the 6th of June, 1861, and on the same day a writ was issued under which the sheriff took possession.

A long correspondence took place between the respective solicitors. The plaintiff's solicitor inquired whether the defendant's solicitors would consent to a judge's order for re-possession on payment of costs and the rent. The defendant's solicitors replied that the action was brought for the following breaches:—Nonpayment of rent, insurance, and repairs; that the houses were greatly out of repair, and, unless plaintiff could show some sufficient reason, they could not advise Mr. Creasy to allow Miss Bamford to redeem.

Judgment in the action was entered up against Thomas Halfpenny alone. The plaintiff did not enter any appearance. On the 28th of August her solicitor took out a summons in the action to show cause why all proceedings under the judgment should not be set aside for irregularity, on the ground that judgment had not been signed against the plaintiff; or why possession should not be given up on payment of arrears of rent (then admitted to amount to 11*l.* 5*s.*) On the 10th September the summons came on to be heard before Sir H. Keating, who expressed his opinion and regret that he had no jurisdiction.

On the 19th September, 1861, plaintiff's solicitor tendered to defendant's solicitors the sum of 40*l.*, being 11*l.* 5*s.* for arrears of rent up to the 24th June, 10*l.* for costs, and 10*l.* in satisfaction of alleged repairs. The tender was refused. On the 26th October another tender of 40*l.* was made by the plaintiff's solicitor, being 13*l.* 10*s.*,

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for arrears of rent, 10*l.* for costs, and 10*l.* in satisfaction of repairs. This was also refused.

The bill alleged that the costs could not have exceeded 10*l.*, nor the repairs 10*l.*; and prayed that, upon payment by plaintiff to defendant of the arrears of rent and costs properly incurred, the plaintiff might be relieved from the penalty or forfeiture, and might be let into possession; and that the defendant might be ordered to deliver up possession accordingly.

The defendant, by his answer, alleged that, in March 1856, he purchased the fee simple of the three houses, subject to the said lease; that, after Lady Day, 1861, he made several inquiries as to the plaintiff's address, but without success; and at length, finding that the houses were deserted and falling out of repair, he commenced the action of ejectment. He alleged that he had paid for carpenters' and plumbers' work, white-washing, cleansing, and painting, sums amounting to 16*l.* 12*s.*; water-rates amounting to 2*l.* 11*s.*; costs of the ejectment and expenses, 14*l.* 13*s.*; insurance and policy, 1*l.* 3*s.* 9*d.*; surveyor's fees, 3*l.* 3*s.*; and personal expenses, 5*l.* The houses had been since let at a rent of 16*l.* a year each. He submitted that the plaintiff had committed four distinct breaches of covenant, by nonpayment of rent, nonpayment of rates and taxes, non-repair, and non-production of the insurance policy and the receipt for the premium; and that the plaintiff had no right to be relieved against the forfeiture. He admitted that he had not given notice of his intention to repair, and submitted that no such notice on his part was necessary.

The plaintiff amended her bill, and alleged that the expenditure incurred by the defendant was unnecessary; and also prayed, by amendment, that the defendant might be ordered to pay to the plaintiff all sums of money received by him for rent.

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At the bar the defendant admitted that, if his rent, the amount expended by him in repairs, and all his costs at law and in equity, were paid, he was willing to give up possession to the plaintiff.

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Mr. *Greene* and Mr. *Locock Webb* opened the case for the plaintiff, but his Honour called on the counsel for the defendants.

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They mentioned the case of *Dowell* v. *Dew* (*a*).

Mr. *Malins* and Mr. *Welford* for the plaintiff.

The plaintiff in equity has committed breaches of the covenant to pay rent, to repair, and to insure; but before the late Act of Parliament it was well settled that this Court would not extend the relief granted against forfeiture beyond the payment of money. *Hill* v. *Barclay* (*b*). It would not relieve against a breach of covenant to repair or to insure: *Reynolds* v. *Pitt* (*c*). [*Doe* dem. *Mayhew* v. *Asby* (*d*), was also cited.]

Moreover, where the proceedings in ejectment ad- been completed, this Court would not interfere: *Harrison* v. *Nettlesship* (*e*).

Again, under the Common Law Procedure Act, 15 & 16 Vic. c. 76, s. 211, the tenant was bound to pay into court the amount of rent and costs, and that had not been done; neither, under 23 & 24 Vic. c. 35, was the plaintiff entitled to relief against the breach of covenant to insure, inasmuch as there was not on foot an insurance at the time of the application. On these grounds it was submitted that the plaintiff's case must fail. [*Penniall* v. *Harborne* (*f*), *Green* v. *Bridges* (*g*), *Gregory*

(*a*) 1 Y. & C. C. C. 364, 345.
(*b*) 18 Ves. 56.
(*c*) 19 Ves. 134.
(*d*) 10 Ad. & E. 71
(*e*) 2 M. & K. 423.
(*f*) 11 Ad. & E. N. S. 368.
(*g*) 4 Sim. 96.

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v. *Wilson* (*a*), *Job* v. *Banister* (*b*), *Doe* v. *Meux* (*c*), were also cited.]

Judgment.

THE VICE-CHANCELLOR:—

The judgment in the action of ejectment has been obtained under very extraordinary circumstances. It has been argued that, until the law was modified by the recent statute, this Court never granted relief against any forfeiture for breaches of covenant to repair or to insure; and the cases of *Hill* v. *Barclay* and *Reynolds* v. *Pitt* have been cited. But the cases of *Hill* v. *Barclay*, *Reynolds* v. *Pitt*, and *Gregory* v. *Wilson*, are cases in which the plaintiff in equity came seeking an injunction to restrain proceedings at law, confessing in equity a breach of covenant, and asking for relief to restrain his landlord trying the question upon his strict legal right. These are cases in which the Court has always refused to interfere, treating the question of breach of covenant or not, or of forfeiture or not, as one with which this Court will not deal, where the landlord has a clear legal right upon the covenant. But Lord Eldon, in the case of *Hill* v. *Barclay*, never said that the Court would not under any circumstances grant relief for a breach of such covenants. On the contrary, in *Hill* v. *Barclay* Lord Eldon said, "I do not mean to apply these observations to cases of accident and surprise; the effect of the weather, for instance, in this case, or permissive want of repair, the landlord standing by and looking on." This showed that in Lord Eldon's opinion there might be a case with special circumstances which would entitle a tenant as plaintiff in equity to relief against forfeiture clearly incurred at law.

(*a*) 9 Hare, 683.
(*b*) 2 K. & J. 279.
(*c*) B. & C. 606.

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But the question now before the Court seems to me to have little or nothing to do with *Hill* v *Barclay*, *Reynolds* v. *Pitt*, and *Gregory* v. *Wilson*, for in this case the judgment was obtained by default in an action of ejectment; the circumstances under which that judgment was obtained being such that it cannot be considered either as a confession of the breach of covenant or an adjudication upon evidence that there has been any breach at all. On the contrary the defendant now seeks to establish in this Court a breach of the covenant, which would entitle him to insist on the forfeiture of the lease; and he urges the facts he proves as a reason why the Court should refuse relief to the plaintiff altogether.

Where this Court has to decide the question whether certain covenants were broken or not, it is only in cases of the clearest breach of covenant that this Court should refuse relief upon such grounds. In the present case judgment has been obtained by default; the question of breach of covenant has never been tried at law; and after hearing the evidence upon the question whether there was any breach of covenant or not, I am not satisfied that the acts alleged were in positive breach of any of these covenants.

The Legislature, from the hardships upon tenants in the two strongest cases, those of forfeiture for non-payment of rent and for non-insurance, has authorized relief in proper cases. The plaintiff in the present case seems to me to have had no fair opportunity of having her right determined by a court of law under the new jurisdiction which the Legislature has given. Upon the evidence the plaintiff seems to me entitled to relief; the only question that remains is as to the terms of the relief.

The defendant at the hearing offered that, if his costs of suit, both at law and equity, rent and expenses for

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repairs, were paid, to waive all objection to the relief asked. The case has been argued on a question of costs, and must be disposed of having regard to the conduct of the parties. Had the plaintiff taken the right course she might have obtained relief in a summary way at law. On the other hand, the defendant, before the suit was instituted, being asked to state what his demand was in respect of rent and breaches of covenant, the purpose of the plaintiff being to give him a full indemnity, and to pay all his rent, costs, and expenses, positively declined to state what the amount of his costs was. He says, in his answer, "I repeat and humbly insist that the plaintiff has no right or title to require me to set forth or state the amount which I have expended on or in respect of the said messuages or premises," and adds, "I have hereinbefore stated the amount and particulars of the several sums of money I have expended." But he gave the plaintiff no opportunity of making any additional offer before the bill was filed, and has driven her into this Court. In that state of things the decree must be that the plaintiff be restored to possession on payment of the taxed costs at law, the arrears of rent, the sum due for repairs, the insurance premium, and 50*l.* costs in equity; the defendant to account to the plaintiff for the rent received by him; with liberty to apply.

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July 1, 12, 14, 23, 26.

Where a defendant had contracted to supply large quantities of bricks for fortifications; and, having obtained a lease of a great extent of land containing brick clay, erected there numerous brick-kilns, within 340 yards of the plaintiff's mansion, and close to her boundary, the Court restrained the nuisance, there being nothing to show that the defendant might not have burnt the bricks elsewhere, so as not to be a nuisance.—*Hole* v. *Barlow*, 4 C. B. 334, observed on.

THIS bill was filed by the plaintiff praying that the defendant, his servants, &c., might be restrained by injunction from lighting, or causing to be lighted, or fired, such of the kilns as had not been already fired or lighted; and from refilling with bricks, relighting, or refilling, or causing to be refilled, and relighted or refilled, such of the kilns as have been already fired or lighted; and also from burning, or causing to be burnt, any bricks so near to the plaintiff's residence as to cause damage or annoyance to the plaintiff, or to the inmates of her mansion-house, or injury to the trees, plantations, shrubberies, &c., growing on the plaintiff's property; and that damages might be awarded for the injury sustained by reason of the brick being on the kilns already lighted near the house.

The bill stated the case as follows:—

The plaintiff is the widow of the late John Beardmore, Esq., who in 1842 purchased the mansion-house and lands situate near Fareham, in the county of Southampton, and known as Uplands. John Beardmore occupied the said mansion-house and lands, until the time of his death, as his principal place of residence, and, by his will, devised the Uplands estate to the plaintiff, who, upon the death of John Beardmore, 1861, became entitled thereto, and resided at the said mansion-house ever since her husband's decease.

The defendant is a contractor, and has entered into large contracts for the completion of certain portions of the fortifications now in course of erection at Portsdown

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Hill, near Portsmouth. The Uplands estate comprises the mansion-house, with offices attached, surrounded by an ornamental park, pleasure grounds, and flower and kitchen gardens. The defendant recently became the occupier of certain lands lying towards the south of, and adjoining to, the said Uplands estate, which lands contain certain quantities of earth suitable for making bricks. In January last the defendant began to make preparations for the manufacture of bricks on certain portions of the said lands occupied by him, which adjoin the lands of the plaintiff, and began to construct kilns for the purpose of burning bricks within a short distance of the lands of the plaintiff.

The plaintiff, becoming thereupon apprehensive that damage and nuisance would arise to her property and herself, if the burning of bricks were carried on at the spot and in the mode indicated by the preparations of the defendant, wrote to Messrs. Kelsall and Co., of Fareham, the defendant's solicitors, a letter, of which the material part was as follows:—

"To Messrs. Kelsall, Solicitors, Fareham.

"Uplands, 31st January, 1862.

"Gentlemen . . . . I have just heard that Messrs. Tredwell are preparing to build kilns and burn bricks on the upper part of Mr. Paddon's field, near my property. I have no desire to interfere, unnecessarily, with Messrs. Tredwell's works, but I must object to any thing that will be a nuisance or injury to my house or property; and burning of bricks, in the above situation, will bring not only smoke, but most disagreeable smells, to Mayling's house, and also to my own residence, and in various ways the trees and ornamental plantations will be injured.

They have been planted and kept up at a great expense for several years.

"I hope that Messrs. Tredwell can place their works at such a distance, and in such a position, as to be no annoyance or injury to me or my property; and they must take this as notice that I shall take every means to protect myself and my property.

"I am informed that in several recent cases the Court of Chancery has, by injunction, stopped brickworks that were an annoyance or nuisance.

"I am, Gentlemen,

"Yours truly,

"M. A. BEARDMORE."

Messrs. Kelsall and Co. thereupon informed the plaintiff that the letter had been forwarded by them to the defendant, and the plaintiff subsequently received from the defendant the following letter:—

"Portsdown Hill Fortifications

"(William Tredwell, Contractor),

"Office, Fareham, Hants. February 1st, 1862.

"Mrs. M. A. BEARDMORE.

"Madam,—I beg to acknowledge receipt of yours dated 31st of May, 1862, through the hands of Messrs. Kelsall, as also to state that the reference made therein shall be attended to.

"I am, Madam,

"Yours truly,

"J. R. IVERY,

"p. J. T. HARDYMAN."

Since the said correspondence the defendant proceeded with his said preparations, and constructed at the northern

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portions of his land twenty-eight large kilns for burning bricks. Of the said twenty-eight kilns eleven are erected in a line nearly parallel to the boundary of the plaintiff's park, and eight out of the eleven at distances varying from thirty-two to fifty-five yards from the plaintiff's boundary. Three others of the said twenty-eight kilns are erected near to a projecting angle or corner of the plaintiff's park, at which point there is a valuable plantation. Of the said eleven kilns eight have already been lighted, and the three kilns at the corner have also been lighted, and since they have been lighted it has become apparent that the plaintiff's property will be irreparably injured should the burning of bricks be continued at the spot and in the mode proposed by the defendant. The smoke and noxious vapours from the said brick kilns which have been already lighted have injured to a great extent the trees in the plaintiff's park, and many young trees forming part of plantations specially planted by the said John Beardmore in order to screen from view unsightly objects, or to add to the beauty of the park, have already been so injured that they must unavoidably die, and the noxious fumes from the said kilns already lighted have already reached and been driven into the mansion-house, and have interfered with the comfort of the plaintiff, and of the other inmates of the said mansion-house. The plaintiff, as soon as possible after the damage caused by the firing of the said kilns became apparent, communicated with her solicitors, Messrs. Parke and Pollock, who, on the 23d of June last, wrote and sent on the plaintiff's behalf to the defendants the following letter:—

"63, Lincoln's Inn Fields, London,

"June 23d, 1862.

"Gentlemen,—You will remember that Mrs. Beard-

more on the 31st of January last addressed a letter to Messrs. Kelsall, your solicitors, at Fareham, pointing out the damage as well as nuisance which would inevitably be caused to her property "Uplands," near Fareham, should you build kilns and burn bricks on the immediately adjoining border of the ground rented by you, and stating that should you persist in so doing she would be compelled to seek protection for her property.

"This letter was forwarded to you and duly reached you.

"You have now, however, commenced burning the bricks in kilns on the spot indicated, and the result has already been that very many trees of ornamental timber in Mrs. Beardmore's grounds have been destroyed, while others are so much injured that a little further exposure to the heat and vapour emanating from the kilns will entirely destroy them.

"The injury thus done to the residential character of Mrs. Beardmore's property is irreparable for many years to come, and must be the subject of a claim by her for pecuniary compensation.

"Mrs. Beardmore finds, however, that you are preparing to fire other kilns, and, as the injury which will be done by these to the trees will be even greater than that already sustained, she has instructed us to write to you to inform you that she must apply to the Court of Chancery for an injunction to restrain you from firing these kilns, unless you at once give us an assurance that you will desist from so doing.

"We beg, therefore, to give you notice that, unless we receive from you in the course of Wednesday a distinct assurance in writing that the kilns adjoining Mrs. Beardmore's property which are now being prepared for burning shall not be fired, we shall on Thursday apply for an injunction to restrain you from firing them.

"It is of course far from Mrs. Beardmore's wish and

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from our own to cause you any inconvenience that can be avoided, and with this view we will, if you desire it, arrange with your solicitors that they and their counsel shall attend when the injunction is moved for in the first instance if you will put them in communication with us, and authorise them to undertake that the kilns shall not be fired pending the delay that will be thus caused.

"We are, Sirs,

"Yours obediently,

"PARKE & POLLOCK."

"Messrs. Tredwell."

The only answer received by the plaintiff or her solicitors to the letter stated in the last paragraph was a statement that her letter had been forwarded to the defendant.

The kilns so constructed by the defendant are of a large size; and, so far as the plaintiff has been able to discover, capable of burning about 70,000 bricks each at a time. Each burning of bricks occupies about six days, and the common interval of time between the successive firings at the same kiln of two successive batches of bricks would be about four weeks; so that the construction of the said kilns indicates a probable manufacture and burning of many millions of bricks per annum; and the defendant, in fact, intends (unless restrained as hereinafter prayed) to carry on the manufacture and burning of bricks to a very great extent in order to supply himself with bricks for the purposes of the construction of the said Portsdown fortifications now in course of erection as aforesaid. The nearest of the said kilns are distant about 350 yards from the mansion-house in a south-westerly direction, and, the prevalent winds being from the south and west, the noxious fumes from the said kilns must, during the greater part of the year, be wafted in the direction of the said house; and if the burning of bricks at the said

brick kilns, and more particularly at the eleven kilns and three kilns mentioned in the eighth paragraph should be persisted in, the plaintiff's mansion house will be rendered entirely unfit for her residence, and she will be compelled to abandon it and find a residence elsewhere. The plaintiff is particularly attached to her present residence, her late husband having devoted great care and incurred considerable expense in enlarging the mansion-house, and planting and improving the park, and in fact doing all in his power to render the said mansion-house and property a suitable residence for his wife and family. And the said John Beardmore, subsequently to his original purchase from Sir John Halkett, made other purchases of land in the neghbourhood; and it has always been the intention and desire of the plaintiff to preserve the said mansion-house and property as a family residence and estate for the eldest son, now aged about seven years, of the said John Beardmore and herself, and pecuniary damages would be no adequate compensation for the injury which must be inflicted upon the plaintiff should the manufacture and burning of bricks be carried on at the spot and in the mode proposed by the defendant. The lands occupied by the defendant are of great extent, and contain sites upon which he might erect kilns and burn his bricks without causing damage or annoyance to the plaintiff or her property, or to any other person than himself. The defendant has already filled or nearly filled with bricks certain of the said kilns other than those which have already been lighted as hereinbefore mentioned, and is on the point of lighting or firing the said kilns which have been so filled or nearly filled as aforesaid. And the defendant threatens and intends (unless restrained as hereinafter prayed), after he shall have completed the burning of the bricks which are contained in the kilns which have been already fired, to refill the said last-mentioned kilns with other bricks,

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and to relight or refire such last-mentioned kilns in order to burn other bricks therein.

Evidence was given on behalf of the plaintiff that portions of the young plantations had been burned up by the fires from the bricks.

On the 1st July his Honour granted an interim order, extending over the following Thursday, the 10th, to prevent the defendant lighting any other kilns, the plaintiff entering into the usual undertaking as to damages, with leave to serve a notice of motion for an injunction generally on that day; and directed that service at the counting-house, Fareham, should be good service on Mr. Tredwell.

The hearing of the motion stood over to the 12th July.

Argument.

Mr. *Malins* and Mr. *F. O. Haynes* opened the plaintiff's case, but were stopped by his Honour. They cited the case of *Walker* v. *Selfe* (*a*), in which Vice-Chancellor Knight Bruce, after a careful examination of the authorities, granted an injunction restraining the defendant from burning bricks on his own land. Against that decision the case of *Hole* v. *Barlow* (*b*) militated, but *Hole* v. *Barlow* was at the present time under review, and was not expected to be supported (*c*). It would be

(*a*) 4 De G. & S. 315.

(*b*) 4 C. B. N. S. 334.

(*c*) In *Bamford* v. *Turnley*, reported in 31 Law Journal, 286, the very same question was raised in an action at law; and the Lord Chief Justice of the Queen's Bench, who presided at the trial, adopted the authority of the case of *Holl* v. *Barlow*, and directed the jury that, if they should be of opinion that the spot was a proper and convenient spot and the burning of bricks under the circumstances was a reasonable use by the defendant of his own land, he would be entitled to a verdict, whether there was an interference with the plaintiff's comfort or not. The Court of Queen's Bench having refused to grant a new trial on the ground of misdirection, the plaintiff thereupon appealed to the Court of Exchequer Chamber; on the 12th July, 1862, Lord Chief Justice Erle, Mr. Jus-

contended that the plaintiff was bound first to bring an action, but that was not the inflexible rule of the Court.

tice Williams, Mr. Baron Bramwell, and Mr. Baron Wilde held that the ruling of Chief Justice Cockburn was wrong. Chief Baron Pollock dissenting. The result is, that *Hole* v. *Barlow* is overruled. The judgment of Chief Justice Erle, Justices Williams and Keating, and Baron Wilde is given as follows in the *Law Journal*, p. 290:—

WILLIAMS, J., read the judgment of Erle, C.J., Williams, J., Keating, J., and Wilde, B.—On the argument of this case there was some contest as to what the true question was which the Court had to consider. On the part of the plaintiff it was said to have been proved at the trial, beyond dispute, that the burning of the bricks in the kilns of the defendant was a nuisance, and that the point reserved was, whether it was legalized by the other facts which the jury must be taken to have found to exist. On the part of the defendant it was said that the true point was whether, under all the circumstances of the case, the burning of the bricks amounted to an actionable nuisance. It is not, perhaps, material which of these contentions is correct; for the Lord Chief Justice at the trial directed the jury, on the authority of *Hole* v. *Barlow*, to find for the defendant, notwithstanding his burning the bricks had interfered with the plaintiff's comfort, if they were of opinion that the spot where the bricks were burnt was a proper and convenient spot, and the burning of them was, under the circumstances, a reasonable use by the defendant of his own land. The jury consequently, if they were of that opinion, would have been bound to find their verdict for the defendant, notwithstanding they were also of opinion that the brick-kilns of the defendant, by immitting corrupted air upon the plaintiff's house, had rendered it unfit for healthy or comfortable occupation. It was, therefore, treated as a doctrine of law, that if the spot should be found by the jury to be proper or convenient, and the burning of the bricks a reasonable use of the land, these circumstances would constitute a bar to the action; and if there is in truth no such doctrine, there was a misdirection. It is the same thing as if there had been a plea averring the existence of these circumstances, and a demurrer to the plea. Such a plea, although it would admit all the allegations in the declaration, would be a good plea by way of avoidance if the direction of the Chief Justice was right. And it is not material to inquire whether it would be good as averring facts which amount to a legalization of the nuisance stated in the declaration, or as superadding facts which, taken together with those stated in the declaration, show that the alleged annoyance was not an actionable nuisance. In either point of view the question for our consideration appears to

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[*Pollock* v. *Lester* (*a*), *Broadbent* v. *The Imperial Gas Company* (*b*), *The Attorney-General* v. *The Borough of Birmingham* (*c*), were also cited.]

Argument.

be, whether the case of *Hole* v. *Barlow* was well decided; and we are of opinion that it was not.

That decision was plainly founded on a passage in *Com. Dig.* tit. 'Action on the Case for a Nuisance' (C.), which is in the following words: "So an action does not lie for a reasonable use of my right, though it be to the annoyance of another; as if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." It may be observed that in the language of this dictum (for which no authority is cited by Comyns) there is a want of precision, especially in the words "reasonable" and "convenient," which render its meaning by no means clear; and it may be doubted whether the Court in *Hole* v. *Barlow* did not misunderstand it. What is a convenient place? Does the expression mean, as the Court understood it in that case, a place proper and convenient for the purpose of carrying on the trade? Or does it mean, "*a place where a nuisance will not be caused to another*?" It has been pointed out by Mr. W. H. Willes, in his valuable edition of *Gale on Easements*, p. 410, that this latter sense of the word "convenient" is the one adopted by Chief Justice Hyde in *Jones* v. *Powell*, where he says, "A tan-house is necessary, for all men wear shoes; and nevertheless it may be pulled down if it be erected to the nuisance of another; in like manner of a glass-house: and they ought to be erected in *places convenient for them*." In the original Norman French it is —"Un tan-house est necessary, car touts wear shoes; et uncore ceo poit estre pull down, &c., si est erect al nusance d'auter: et issint de glass-house. Et pur ceux doient estre erect in places convenient pur eux." The term appears to be used in the same sense when applied to questions as to *public* nuisances. Thus, it is said, in *Hawkins's P.C.* book 1, c. 75, s. 10, "It seems to be agreed that a brewhouse erected in such an *inconvenient* place, wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance." It should seem, therefore, that just, as the use of an offensive trade will be indictable as a public nuisance if it be carried on in an *inconvenient* place, *i.e.* a place where it greatly incommodes a multitude of persons, so it will be actionable as a private nuisance if it be carried on in an *inconvenient* place, *i.e.* a place where it greatly incommodes an individual. If this be the true construction of the expression "con-

(*a*) 11 Hare, 266. (*b*) 7 De G. M. & G. 436. (*c*) 4 K. & J. 528.

Mr. *Bacon* and Mr. *Borill* for the defendants.—The defendant had entered into contracts of great importance to himself, and of great interest to the public. The first

venient" in the passage from *Coxeyns*, the doctrine contained in it amounts to no more than what has long been settled law, viz., that a man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him in rendering his residence there less delectable or agreeable: provided the trade be so conducted that it does not cause what amounts in point of law to a nuisance to the neighbouring houses.

In *Hole* v. *Barlow*, however, the Court appear to have read the passage as containing a doctrine that a place may be "proper and convenient" for the carrying on of a trade notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbour. This is a doctrine which has certainly never been judicially adopted in any case before that of *Hole* v. *Barlow*; and, moreover, the adoption of it would be inconsistent with the judgments pronounced in some of the cases cited at the bar during the argument, and more especially with the case of *Walter* v. *Selfe*. And the introduction of such a doctrine into our law would, we think, lead to great inconvenience and hardship; because, as was forcibly urged by Mr. Mellish in arguing for the plaintiff, if the doctrine is to be maintained at all, it must be maintained to the extent that, however ruinous may be the amount of nuisance caused to a neighbour's property by carrying on an offensive trade, he is without redress if the jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose.

It should be observed that the direction of the Judge to the jury in *Hole* v. *Barlow*, which was upheld by the Court of Common Pleas, was simply that the verdict ought to be for the defendant if the place where the bricks were burnt was a proper and convenient place for the purpose. But in the present case the Lord Chief Justice's direction to the jury pointed at a further condition, viz., if the burning of the bricks was under the circumstances a reasonable use by the defendant of his own land. It remains, therefore, to consider whether the doctrine adopted in *Hole* v. *Barlow*, if accompanied with this addition, is maintainable.

If it be good law, that the fitness of the locality prevents the carrying on of an offensive trade from being an actionable nuisance, it appears necessarily to follow that this must be a reasonable use of the land. But if it is not good law, and if the true doctrine is that whenever, taking all the circumstances into consideration,

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objection to this motion was that the plaintiff had herself been willing, in November last, to let Mayling's farm, a part of her property, and much nearer to her residence than the defendant's land, to the defendant for the very purpose of brick-making. It was clear, therefore, that this proceeding was for the purpose of forcing terms upon the defendant. If any damage had been done the law was open, but beyond that the defendant had offered to make any reasonable compensation that might be required. It was quite clear this Court would not interfere without calling on the plaintiff to establish his right at law. [The VICE-CHANCELLOR.—The powers given by the Legislature to the judge make it unnecessary to direct an

including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie whatever the locality may be; then surely the jury cannot properly be asked whether the causing of the annoyance was a reasonable use of the land? If such a question is proper for their consideration in an action such as the present, for a nuisance by immitting corrupted air into the plaintiff's house, we can see no reason why a similar question may not be submitted to the jury in actions for other violations of the ordinary rights of property; *e.g.* the transmission by a neighbour of water in a polluted condition. But certainly it would be difficult to maintain, as the law now stands, that the jury, in such an action, ought to be told to find for the defendant if they thought that the manufactory which caused the impurity of the water was built on a proper and convenient spot, and that the working of it was a reasonable use by the defendant of his own land. Again, where an easement has been gained in addition to the ordinary rights of property, *e.g.* where a right has been gained to the liberal passage of light and air, no one has ever suggested that the jury might be told, in an action for obstructing the free passage of the light and air, to find for the defendant if they were of opinion that the building which caused the obstruction was erected in a proper and convenient place, and in the reasonable enjoyment by the defendant of his own land. And yet on principle it is difficult to see why such a question should not be left to the jury if *Hole* v. *Barlow* was well decided.

We are, however, of opinion that the decision was wrong, and consequently that the direction of the Lord Chief Justice, which was founded on it, was erroneous, and that the verdict for the defendant ought to be set aside, and the verdict entered for the plaintiff.

action.] The case of *Walter* v. *Selfe* was no authority to show that the Court had any power to restrain such acts as these except after a previous trial at law, because in that case both sides requested his Honour to inspect the *locus in quo*, and decide the question of fact. Brick-burning generally was not a nuisance, but a lawful trade, and, however disagreeable to the neighbours, if carried on in a convenient place they had no right to complain. The case of *Walter* v. *Selfe*, moreover, only supported the proposition that where brick-burning is injurious to health the Court will interfere, but not for the sake of injury to property only.

One of the earliest authorities was that of *The Attorney-General* v. *Cleaver* (*a*), in which Lord Eldon declined to restrain the annoyance before the right was tried at law. In *The Duke of Grafton* v. *Hilliard* (*b*) the Court dissolved the injunction, observing that "the manufacture of bricks, though near the habitation of men, if carried on for the purpose of making habitations for them, is not a public nuisance." The purpose here was for making fortifications, but was within the principle of the *dictum*.

[The VICE-CHANCELLOR.—Since the Act of Parliament 21 & 22 Vic. c. 27, it is no longer a matter of course to accompany the injunction by a direction for a trial at law before a jury. The Legislature has declared that in a case of private wrong the Court is to have the power to ascertain and state the damages; that the Court is to act on its own judgment, or is to act with the assistance of a jury; it has said also that the Court is not to send cases for the opinion of a court of law, but when a proper occasion occurs is to have the assistance of a common law judge.]

Admitting that the Court of Chancery has concurrent

(*a*) 18 Ves. 211.
(*b*) Referred to by the Lord Chancellor, ibid. 219.

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power with the courts of common law, the Court will not grant an injunction until the legal right has been established. Until a jury have found that the act is a nuisance the Court will not restrain it by injunction. The legal right to have an injunction could not be maintained on the present evidence. In *Hole* v. *Barlow* (*a*) the case of *Walter* v. *Selfe* was in effect reversed. [*Cleave* v. *Mahany* (*b*) was also referred to.]

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THE VICE-CHANCELLOR:—

There are two questions in this cause,—one, whether, upon the balance of the conflicting evidence, there is sufficient evidence of actual injury to the plaintiff to justify the interference of the Court. If there is, the Court is bound to protect the rights of the plaintiff against what, upon evidence of such an injury, would be a wrongful act. The other is a question of law, which has been repeatedly under the consideration of the Court, and which requires in all cases the most serious attention. In questions of nuisance, not merely as to brick-burning, but as affecting the enjoyment of light and air and of ancient light, the necessities of the public and the rights of individuals make it the duty of this Court to regard the rights and interests of both parties. There may be a case of clear right to the enjoyment of light and air, which nevertheless the Court cannot protect on account of some great public necessity. The expressions used by Mr. Justice Willes in the case of *Hole* v. *Barlow*, which have been cited by the defendant, are applicable to the case of public necessity only. But it is taking too narrow a view to say that public necessity is the only ground upon which the Court may be induced not to interfere to restrain the violation of that which was clearly, in the first instance,

(*a*) 4 C. B. N. S. 334.

(*b*) Not reported—before Sir R. T. Kindersley, 25th July, 1861.

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shown to be a private right. The Court is bound to look to the evidence on both sides. In the case of *Hole* v. *Barlow* a circumstance occurs which does not exist here. In that case the defendant was burning bricks upon his own land, and there was nothing to show that if he did not burn them upon his own land, in the place where he was burning them, he could have burnt them at all. Where a man is injuring his neighbour to a very material extent, in a way not absolutely necessary and unavoidable, in order to the enjoyment of his own fair private right, this Court is always disposed to interfere. In such cases the balance of convenience must be attended to.

Upon the result of the evidence in the present case, it is proved that there has been an actual and positive injury to this plaintiff; that the comfort and enjoyment of her mansion-house have been disturbed; that the ornamental trees, planted to exclude the appearance of unsightly objects, in some cases have been destroyed, and in many cases injured. There is, therefore, in this case evidence of an actual and positive injury to the plaintiff.

The defendant's case is, that he is engaged in a contract for the erection of works for a great and important public purpose; that the immediate erection and the speedy erection of these works is a matter of great importance to the public and to himself. He admits, upon his own statement of the facts, that what he is doing in this place might very well be done elsewhere, without any inconvenience to the plaintiff at all. It is a material part of the plaintiff's case that the country surrounding the place where the injury is alleged to be committed is a country of brick earth, producing earth of various kinds suited for the manufacture of bricks and of pottery. It appears that the defendant, in order to provide himself with bricks as the material for the performance of his contract, has obtained the lease of a very large tract

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of land, any part of which may be used by him for the manufacture of bricks. He has already, in a part of that land nearly the most distant from the plaintiff's house, engaged in burning bricks. But what the plaintiff complains of is, that he carries on his operations close to her land. Where he is now burning bricks is in a straight line towards the south of, and in a direction nearly parallel to, the boundary of the plaintiff's land, at a distance of not much more than twenty yards from which there is a row of eighteen clamps, each of which the defendant claims his right, having erected them there, to fire and burn, notwithstanding the injury which to a slight degree he admits he is doing to the plaintiff.

If he can elsewhere, upon the ground that he has acquired, or upon other grounds which he may acquire, produce those bricks which it is his object to obtain, without injury to the plaintiff, then, upon the law as settled by all the authorities, the Court is bound to interfere. In the case of *Hole* v. *Barlow*, which is the strongest case in the defendant's favour, the land upon which the defendant was burning bricks was his own land, and there was no evidence to show that if he did not burn them there he could obtain the brick-earth at all, or obtain that use of his property to which by law he was entitled. Now, Mr. Justice Byles, before whom the case was tried, told the jury that the circumstance of the thing being done in a convenient and proper place would justify some degree of annoyance. He said, "If you are satisfied from the evidence that the enjoyment of the plaintiff's house was rendered uncomfortable through the instrumentality of the defendant, that is sufficient to entitle the plaintiff to maintain the action." That is the first proposition. The qualification is, "that it is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood that can bring an action." He says, "I

apprehend the law to be this, that no action lies for the use, that is, the reasonable use, of a lawful trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on." It is remarkable that the learned judge says, charging the jury in this way upon the evidence in that case, that he expects the jury would find for the plaintiff. He says, "There certainly was strong evidence on both sides, but I must say I rather expected that the jury would find for the plaintiff." But the jury found for the defendant. In this exposition of the law, the words "convenient and proper" must be taken subject to some qualification. Nobody will doubt that to the brick-burner the place may be convenient, and probably the most convenient that can be found; but it is clear that the mere circumstance of the place being convenient to one party is not enough to justify the continuance of the acts if they make the enjoyment of life and property uncomfortable to the other, or if they may be done elsewhere without these injurious consequences following. The words, therefore, "convenient and proper" must be used with reference to the situation of both parties. On the motion for a new trial Mr. Justice Willes says, "The common law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted is subject to this qualification—that necessities may arise for the interference with that right, *pro bono publico*, to this extent, that such interference being in respect of a matter essential to the business of life, and being conducted in a reasonable and proper manner, and in a reasonable and proper place." If there be another place where it may be conducted without injurious consequences, or with less injury, according to law, the right of a person complaining to have his air uncontaminated and unpolluted would be clear.

In this case no case of necessity on the part of the defendant is proved at all. There are other situations in the

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ground which he has obtained and has at his command on which the operations which he wishes to conduct may be conducted without that degree of injury to the plaintiff which would entitle her to complain. That being so, it is the duty of the Court to interfere.

It is said, however, that the plaintiff herself offered to let him a piece of ground for the purpose of brick-burning, which was nearer her mansion than that upon which the operation is now being conducted. That appears to be a mistake, as the place in question lies at a greater distance. But even if it were nearer, the plaintiff has a right to contract to submit to a nuisance, which without such contract the other party may have no right to inflict.

Nothing, therefore, has been done to deprive the plaintiff of her right to what Mr. Justice Byles justly says is the common law right of every English subject, to the enjoyment of unpolluted air in the neighbourhood of his residence.

But it is said that there ought to be an action directed at law to try the plaintiff's right.

The vexation and expense of litigation in that course of proceeding were so extreme that the Legislature has found it necessary to interfere. The Act of the 21 & 22 Vict. c. 27, s. 2, enacts that, "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against any breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and such damages may be assessed in such manner as the Court may direct." By sect. 3 it enacts that "it shall be lawful for this Court, if it shall think fit, to cause the

amount of such damages in any case to be assessed, or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself." The only question that remains is as to the extent of the restraint to be imposed on the defendant. The injunction that has been already granted on an interim order is in general terms, but the injunction now to be awarded must be confined to any clamps or kilns nearer to the plaintiff's house than the lower extremity of the piece of ground marked 412, or nearer than the clamp marked No. 11 upon the plan which is in evidence in the cause. A radius to that point from the plaintiff's house will define the area within which the injunction must extend. (*a*)

This case was heard on appeal by the Lord Chancellor, when the following order was made by consent:—

The defendant to be permitted to burn out all the bricks prepared for burning within six weeks, at the rate of eight kilns per fortnight, paying the plaintiff 100*l.* as compensation, and also paying her for any damage done to the plantation; the amount of damage to be settled by a reference to Sir Joseph Paxton, who was to be attended by the respective solicitors, and to furnish a report. If he should decline or be unable to carry out the reference, a referee to be named by the Lord Chancellor. Costs reserved. The cause to be brought on again after the report of referee was made.

(*a*) About 653 yards

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June 17. RADCLIFFE *v.* THE DUKE OF PORTLAND.

Where the occupier of a house and grounds in London erected a translucent screen of glass thirty-five feet high and thirty feet distant from the plaintiff's dwelling, having louvres to admit air, the Court refused to grant an injunction.

THIS bill was filed by Dr. C. B. Radcliffe, the occupier of a house, No. 4, Henrietta Street, Cavendish Square, under an assignment dated the 14th of April, 1851, of the house and premises, for all the rest and residue of a term of forty-nine years, from the 6th of July, 1828, created by an indenture of lease dated the 7th of July, 1828, and executed by the late Duke of Portland to one Burt, in consideration of a sum of 400*l.* and a yearly rent of 63*l.*

Behind the house was a yard corresponding with it in width, and measuring about nineteen feet in depth, which was bounded on the north by an outbuilding about ten feet high or thereabouts, communicating by a door with a passage abutting towards the north on the inclosing fence wall of the garden or pleasure-ground of Harcourt House, the residence of the Duke of Portland. This wall was about twelve feet five inches high.

The bill alleged that the house No. 4, Henrietta Street, consisted of a basement story, a ground floor, and three rooms above; the principal rooms were at the back of the house, and were and had been for twenty years lighted by windows fronting the yard. The area of the pleasure-ground of Harcourt House was about 2300 square yards.

The bill alleged that "the premises known as Harcourt House extended to the east side of Wimpole Street. In the rear of Harcourt House is an open space of ground which now is and for many years, exceeding twenty years last past, has been used as a garden or pleasure-ground (being the garden or pleasure-ground hereinbefore referred to) for the said residence, such open space of ground forming an area of about 2300 square yards, and

extends about 138 feet from the rear of Harcourt House in a direct line along the south side of and is bounded in part by the enclosing fence wall at the rear of the premises Nos. 2, 3, and 4, in Henrietta Street, and also extends about 138 feet from the rear of Harcourt House aforesaid, in a direct line along the north side of and is bounded by the party fence wall at the rear of the premises Nos. 51, 52, 53, 54, 55, and 56, in Wigmore Street, up to a certain building used for stabling for the said residence called Harcourt House, which building extends along the whole west side of the said open space of ground, such stabling being of the height of about eighteen feet. On the west side of the said stabling there was until very recently a fence wall of about the same height as the said stabling extending along and fronting upon the east side of Wimpole Street aforesaid for about 150 feet."

In March, 1862, the duke caused the wall on the east side of Wimpole Street to be taken down, and commenced building a new wall to the height of forty-two feet. On the 11th of March, 1862, the plaintiff wrote to the duke complaining of the injury occasioned by building in the houses, to which his Grace assented, but stated that what he had done was the inevitable result of other buildings which had been erected.

The duke having shortly afterwards commenced the erection of a screen on the north and south sides of the garden, the plaintiff and other of his tenants, thinking it probable that the completion of it would cause them serious injury by obstructing the light and ventilation of their houses, communicated with each other, in consequence whereof Mr. T. Henry wrote to the duke's solicitors as follows:—

"11, Argyle Street, April 22nd, 1862.

"Gentlemen,—Knowing you to be professionally con-

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cerned for the Duke of Portland, I take the liberty of addressing you on some building operations now being carried on in the rear court of Harcourt House, Cavendish Square, by erecting a high glass screen against and considerably above the back walls of the properties in Wigmore and Henrietta Streets. As I am concerned for a party holding the long leases of three houses in Wigmore Street, Nos. 51, 52, and 53, my attention has been more particularly required to this part of the intended operations, and I must express a firm opinion, the light and air, with the rights and privileges enjoyed and held under this demise, and also the value of these several houses, will be so materially affected and deteriorated as to cause my client a serious loss of rental. The several tenants have already expressed their opposition, and those who hold by a yearly tenancy only I fully expect will give up the occupation at the earliest opportunity, when I much fear some difficulty will be found in gaining new tenants. I am permitted to inform you that the leaseholder of the premises No. 54 (Briggs) also joins me in this communication and expression of dissent to these operations; that I trust you will think it right to state this case to the Duke of Portland, and inform him that his reconsideration of the matter is respectfully solicited before the works are commenced. I ought also to inform you that I have been in correspondence with Mr. Legg, the architect acting for the Duke of Portland in these works; but having failed in my endeavour to gain an interview with him, and being to some extent known to you, I am induced to intrude this upon your attention, and, with many apologies, beg to remain

"Your obedient servant,

"FREDERICK HERING.

"Messrs. Bailey, Shaw, Smith, & Bailey."

No answer having been returned to this letter, a second

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application was made, and, no reply having been returned, this bill was filed for an injunction. The 17th, 18th, 19th, and 20th paragraphs of the bill described the nature and effect of the acts complained of as follows:—

The aforesaid erection, when completed, will form a screen consisting of a range of strong upright iron stauncheons, filled in with iron sashes and glazed with fluted glass, and will extend along the whole of the back fronts of the premises, Nos. 2 and 3, and part of No. 4, Henrietta Street aforesaid, and at a distance from the back front of the plaintiff's said house of only thirty feet. The said erection is upwards of twenty-two feet in height above the said enclosing fence wall of the garden or pleasure-ground of Harcourt House aforesaid, and about thirty-five feet from the ground. A similar erection is being made by the defendant the whole length of the back fronts of the premises, Nos. 52, 53, 54, 55, and 56, and part of No. 51, Wigmore Street aforesaid, which abut on the south side on the said garden or pleasure-ground.

The erection of the said screen, if completed, will be seriously prejudicial to the plaintiff. It will greatly interfere with the enjoyment of the light and air which he has hitherto had in the occupation of his said house by obstructing such light and impeding the circulation of air.

In the framework of the said erection it is intended to introduce slanting panes of glass called louvres with the object of admitting air thereby; but the effect of such louvres will necessarily be to cause currents or draughts of air, and an accumulation by means thereof of soot and blacks, to the great annoyance and nuisance of the plaintiff and his establishment in the enjoyment of his said house and premises; and unless the glass screen work is kept continually clean and free from dust and dirt the same will necessarily become opaque and cause

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still greater obstruction to the light and air of the plaintiff's said house and premises.

The erection, completion, and continuance of the said screen will cause substantial and irreparable damage and injury to the plaintiff in the enjoyment of his said house and premises.

The defendant threatens and intends, notwithstanding the remonstrances made to him as aforesaid, to complete and continue the erection of the said screen unless he shall be restrained from so doing by the injunction of this Honourable Court.

The bill prayed for an injunction to restrain the defendant, his agent, &c., from further proceeding with the erection or completion of the said screen, and also from obstructing, or causing to be obstructed, by means of the screen or otherwise, the light or ventilation of the plaintiff's house.

On behalf of the plaintiff three surveyors deposed that they believed the screen, if completed, would seriously obstruct the light and impede the circulation of air.

The duke's architect said that he had received instructions to prepare a design for a private road in the garden at the back of Harcourt House, by raising the garden walls to a small extent, and springing therefrom a roof to cover the path or road round the lawn, or to adopt such other mode as would accomplish the object without prejudice to the surrounding tenants. That in obedience to special instructions he met the district surveyor on the subject, and after a conference with him it was deemed advisable not to raise the walls much, if at all; and the present screen was devised. It was proposed to keep the sashes clean by a moveable platform to be made expressly for the purpose, and applicable to both sides of the screen.

Professor Odling, on the same side, deposed that, owing to the fluting of the glass, the outlines of objects

seen through it were confused, and the objects themselves rendered undistinguishable; but that the amount and intensity of light passing through the glass were quite as great as through ordinary window glass.

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Affidavits in support of the injunction were filed by tenants of houses in Wimpole and Wigmore Streets.

In support of the motion Dr. Lankester, by an affidavit, deposed that, in his opinion, fluting of the glass must necessarily tend to diminish the quantity and quality of the light; and that even if the glass were kept perfectly clean the glare would be very distressing to the eyes and hurtful to the sight. He could not subscribe to the opinion that the corrugation of the glass did not diminish or alter the light. He thought it must tend to render the glass more opaque.

None of the tenants of the houses immediately opposite to which the glass screen had been finished gave evidence in support of the motion.

Argument.

Mr. *Malins* and Mr. *C. Barber* for the motion.—The only question was as to the degree of injury, for that some diminution of the light and air must be the result of the erection was too obvious to require proof. It was not necessary that any given amount of obstruction should be proved; it was quite enough that there should be evidence, as here, that the obstruction was to such a degree as to affect the comfort of the plaintiff's residence. That was here proved beyond controversy. In *Hertz* v. *The Union Bank* (*a*) the amount of obstruction was infinitesimally small, but it was shown to be injurious; therefore the Court restrained it. The same doctrine was laid down in the case of *Arcedeckne* v. *Kelk* (*b*), and an injunction awarded. It was submitted, therefore, that the plaintiff was entitled to the assistance of the Court.

(*a*) *Antè*, vol. ii. 686. (*b*) Ibid. 683.

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Mr. *Bacon* and Mr. *T. Stevens* appeared for the defendant, but were not called on by his Honour.

Judgment.

THE VICE-CHANCELLOR:—

The case is one of novelty, the nature of the obstrucion complained of being, as far as I know, perfectly new. There is no evidence of any actual obstruction of light and air, while it appears that the glass is inserted in that part of the screen which is completed opposite the houses numbered 3 and 2, the inhabitants of which are said to be remonstrants against this erection. But although the inhabitants of these houses are said to be remonstrants, they are not plaintiffs, and they are not witnesses. If there had been a material obstruction of light and air it would have been very easy for the inhabitants of the plaintiff's house, or any other person who went to the house and looked from the windows, to have given evidence from actual observation of the effect produced by the structure. It would have been very easy to produce evidence of that that kind; and what is to be inferred from its non-production? I can only infer that no actual evidence can be given, as certainly none has been given, of any obstruction of light or air by that part of this erection which has been completed. The plaintiff's evidence as to injury consists not of evidence of facts but of opinions. There are the opinions, first of all, of the inhabitant of this house, who is the plaintiff, then of several architects and surveyors, and lastly, and perhaps most materially, of Dr. Lankester, who is a man of eminence and science. What does their evidence amount to? Only to the opinion that the effect of the erection will be to occasion a material obstruction of light and air. It is to be observed that the plaintiff launched his case by relying upon the obstruction of light which would accrue from the glass, now transparent, becoming gradually covered with soot and dirt, so that, instead of being transparent, it would

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become obscured. But the defendant's evidence shows that this has been anticipated, and that a part of the plan on which the defendant is proceeding is, that there shall be moveable platforms to provide for keeping the glass clean upon both sides, so as to preserve it in a transparent state, and secure the transmission of light. This part of his plan the defendant says he intends to adopt for his own comfort, as well as with a view to the convenience of the plaintiff and the other inhabitants of houses opposite to his screen. I can see no ground for the observations that have been made upon the defendant's conduct in regard to the complaints made to him. Wishing to secure the privacy of his lawn and garden behind Harcourt House, he resolved to do it in a way which should be most likely to prevent any serious injury, or any just cause of complaint as regards his tenants and neighbours.

The case, therefore, is in this situation, that, there being no evidence except as to the opinion of what may happen, when there might have been evidence of what actually has happened, I think I should not be justified in granting any such injunction as has been asked for.

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PRINCIPAL MATTERS.

ABORTIVE INVESTMENT.

See LAND TAKEN BY RAILWAY COMPANY, 2.

ACCOUNT.

The agent employed by a trustee is not accountable so long as his acts are merely acts of agency, but, where a solicitor got possession of the trust moneys and allowed the executrix, who was entitled to the income only, to misapply the principal, the Court directed an account against him as if he were a trustee. *Morgan* v. *Stephens.* 226

ACCRUER.

See SETTLED ESTATES ACTS, 2.

ACKNOWLEDGMENT.

See MORTGAGE.

ACT OF BANKRUPTCY.

Where a trader in insolvent circumstances by a bill of sale assigned to one creditor all his household furniture and effects and the goods and chattels in and upon his place of business, and was afterwards adjudged bankrupt—*Held*, that the assignment was an act of bankruptcy and fraudulent and void against the assignees. *The Oriental Banking Company* v. *Coleman.* 11

ACTION.

See BILL, IMPROPER.

ADVANCEMENT.

Where a father advanced money on mortgage of real estate, and contrary to his solicitor's advice, without his son's knowledge, took the conveyance in his son's name, and subsequently told him it was a gift, but reserving the interest for the father's life, and added "There are your deeds," which the son ultimately took and retained,—on a bill by the father against the son, the Court declared that the transaction was not an advancement, but made the father pay the costs of the suit.

To rebut the presumption of advancement there must be evidence of facts contemporaneous with the act in question. *Dumper* v. *Dumper.* 583

See WILL, 7, 8.

ADVOWSON.

See SIMONY.

AGENT.

See ACCOUNT.

AGREEMENT.

See INDEMNITY.
PAROL AGREEMENT.

AIR.

See ANCIENT LIGHTS.

ANCIENT LIGHTS.

Where the occupier of a house and grounds in London erected a translucent screen of glass thirty-five feet high and thirty feet distant from the plaintiff's dwelling, having louvres to admit air, the Court refused to grant an injunction. *Radcliffe* v. *The Duke of Portland.* 703

ANSWER.

See INSUFFICIENT ANSWER.
PLEADING.

APPOINTMENT.

See POWER.
SETTLEMENT.
VOLUNTARY DEED, 2.
WILL, 2.

APPRENTICE.

Bill by an apprentice praying that the defendant (his master) might be ordered to execute the indenture of apprenticeship, and to take him into his employ, and to teach him his trade—Dismissed without costs, it appearing that the plaintiff's conduct was objectionable on account of his idleness and other unsatisfactory particulars. *Brown* v. *Banks.* 190

ARBITRATION.

See BUILDING CONTRACT.

ARCHITECT.

See BUILDING CONTRACT.

ARREARS.

See MORTGAGE.

ASSIGNMENT.

See ACT OF BANKRUPTCY.
DEPOSIT NOTE.
PENSION.
ASSIGNMENT OF PENSION.
POLICY OF ASSURANCE.

ATTORNEY (WARRANT OF).

See USURY.

AVERMENT.

See PLEA.
PLEADING.

BALANCE.

See SET-OFF.

BANKRUPTCY.

Where a bankrupt trader compounded with his general creditors for four shillings in the pound, but gave as security to one creditor his I O U for the whole debt in order to induce him to concur in annulling the bankruptcy and afterwards, in consideration of a loan, exchanged the I O U for bills which he accepted, the Court, at the suit of the trader, declared the bills invalid, but without costs. *Mare* v. *Warner.* 100
Mare v. *Earle.* 108

See ACT OF BANKRUPTCY.
NOTICE.

BILL.

See APPRENTICE.

BILL (DEFENSIVE).

See SECURITY FOR COSTS.

BILL OF EXCHANGE.

See BANKRUPTCY.

BILL (FORMER).

See PLEA.

BILL (IMPROPER).

A bill of interpleader, where the whole ground for relief rested on a false allegation of a threat, and intention by one of the defendants to bring an action, was dismissed; and the plaintiff's solicitor, who filed the bill, being proved to be aware that the allegation was groundless, it was ordered, on the petition of one of the defendants, for whom he also acted as a solicitor, that all items in his bill of costs in respect of the interpleader suit be disallowed. *Cook* v. *The Earl of Rosslyn. Re Hook* (Solicitor). 175

BILL OF SALE.

See ACT OF BANKRUPTCY.

BILL, VEXATIOUS.

See COSTS OF SUIT.

BOND.

See DEBTOR TO ESTATE.
RAILWAY COMPANY.
SURETY.

BREACH OF TRUST.

Bill against two of three trustees to make good trust monies which they had allowed their co-trustee to receive, dismissed with costs: the will having, besides the usual indemnity clause, provided "that any trustee who should pay to his co-trustee, or enable him to receive, monies for the general purposes of the will, should not be obliged to see to the due application thereof, or be responsible by express or implied notice of the misapplication. *Wilkins* v. *Hogg.* 116

BRICKBURNING.

See NUISANCE.

BUILDING CONTRACT.

Bill by a contractor alleging unfair conduct on the part of the architect, whose decision was by the terms of the contract made final, and who ousted the contractor and finished the buildings. The Court, on proof of such unfair contract, decreed payment of the balance due to the plaintiff on the contract, and relieved the contractor from penalties, declared the architect's decision not binding, and ordered both the defendants (the architect and the contracting party) to pay the costs of the suit. *Pawley* v. *Turnbull.* 70

BUILDING LEASE.

See LEASE.

CANCELLATION OF BOND.

See SURETY.

CERTIFICATE.

See SHAREHOLDER.

CESTUI QUE TRUST.

See VOLUNTARY DEED, 2.

CHAPEL.

The trust deed of a Baptist chapel provided that the trustees should allow the minister to occupy a house (part of the trust property); but in case he did not occupy it authorised the trustees to let it and apply the rents to pay off the mortgage. The trustees, without offering it to the

minister, let the house to another person for the alleged purpose of applying the rent to pay off a mortgage, but the Court set the lease aside, and ordered possession to be given to the minister.

The majority of trustees of a Dissenting chapel have no right to deal with the trust property otherwise than according to the true construction of the deed of trust. *Ward* v. *Hipwell.* 547

See WILL, 1.

CHARGE.

See MORTGAGE.
USURY.
SOLICITOR AND CLIENT, 3, 4.

CHARITY.

See WILL, 1, 4, 10.
WILL AND CODICIL.

CHILD.

See LIFE, LEGAL.

CHILDREN.

See WILL, 2, 3, 5, 6, 7, 8.

CLASS.

See TRUST ESTATES.
WILL, 3, 5.

CLIENT.

See EXAMINATION.
SOLICITOR AND CLIENT, *passim.*

COAL.

See PARTNERSHIP, 3.
MINES.

CODICIL.

See WILL, 11.
WILL AND CODICIL.

COMMON CARRIERS.

Demurrer to a bill alleging that the defendants having undertaken the duty of carrying goods as common carriers on behalf the plaintiffs, who were also carriers, instead of delivering them to the plaintiffs to whose care they were addressed at the station, claimed the right to carry them to the customers of the plaintiffs, overruled with costs.

The recent statute 17 & 18 Vic. c. 31, which gives power to Courts of Common Law to grant the preventive remedy, does not by giving a concurrent jurisdiction abridge the jurisdiction of the Court. *Baxendale* v. *The West Midland Railway Company.* 650

COMPANY.

See CONTRIBUTORY.
DEPOSIT NOTE.
INDEMNITY.
LAND TAKEN BY RAILWAY COMPANY.
PENALTY.
SHAREHOLDER.

COMPENSATION.

See MISDESCRIPTION.

COMPOSITION.

See BANKRUPTCY.

CONSIDERATION.

See PRESSURE.

CONSOLS.

See TRUST.

CONTEMPT.

A seizure of partnership assets in the possession of a receiver appointed by the Court, of which the execution creditor had notice, held to be a contempt on the part of the execution creditor and of the sheriff; and the Court ordered both respondents to pay the costs of the seizure and of a motion to commit for such contempt. *Lane* v. *Sterne,* 629

CONTRACT.

See BUILDING CONTRACT.
LIABILITY OF EXECUTOR, 2.
NUISANCE.
REPRESENTATION.

CONTRACTOR.

See BUILDING CONTRACT.

CONTRIBUTORY.

On an application by the official manager of a company ordered to be wound up, the Court refused to put in the list of contributories, or to declare liable to contribute to the debts of the company, a provisional director and allottee of fifty shares, who had attended meetings and taken part in the proceedings, but had never signed the subscription contracts. *Re The Winding-up Acts; Re The Hereford and Merthyr Tydvil Junction Railway Company; Maitland's Case.* 28

COURTS OF COMMON LAW.

See COMMON CARRIERS.

COSTS.

See APPRENTICE.
BILL, IMPROPER.
CONTEMPT.
FORFEITURE.
LAND TAKEN BY RAILWAY COMPANY, 2.

COSTS OF SUIT.

To an administration suit the executors put in their answer alleging that the suit was vexatious, and that nothing was due, and resisted the demand for an account; but an account being decreed they claimed first 400*l.* and subsequently 60*l.*, but the chief clerk having certified that 220*l.* was due from them, the Court ordered them to pay the costs of the suit. *Mosley* v. *Ward*, 11 Ves. 581, considered; *Eglin* v. *Sanderson.* 434

CREDITORS.

See BANKRUPTCY.
INDEMNITY.
LIABILITY OF EXECUTOR, 1, 3.
POLICY OF ASSURANCE.

CY PRES.

See WILL, 13.

DEBT.

See BANKRUPTCY.
CONTRIBUTORY.
COSTS OF SUIT.
SET-OFF.

DEBTOR TO ESTATE.

An executor, who was also the obligor of a bond for £2000 found in testator's possession at the death, charged with the whole sum notwithstanding his oath that he had only received £1500, it appearing that shortly before his death he had paid interest on the £2000, and that the testator, in a letter tied up with the will, mentioned the bond as a part of his assets. *Inskip's case* (1). 352

DEED.

See VOLUNTARY DEED, 1, 2.

DEFAULT OF APPOINTMENT.

See WILL, 2.

DEMURRER.

See COMMON CARRIERS.
EXPENDITURE.
RAILWAY COMPANY.
REPRESENTATION.
SECURITY.

DEPOSIT.

See SECURITY.

DEPOSIT NOTE.

A director of an insurance com-

pany indebted for calls delivered a deposit note of the company to the plaintiff for value and without notice.—*Held*, that the company were liable on the note, and could not set off against the plaintiff the amount due from the director for calls. *Woodhams* v. *The Anglo-Australian and Universal Family Assurance Company.* 238

DESCRIPTION.

See WILL, 5.

DESERTION.

See WIFE'S EQUITY TO SETTLEMENT.

DISMISSAL OF BILL.

See APPRENTICE.
PLEA.

DISSENTERS.

See CHAPEL.
WILL, 1.

DISSOLUTION.

See PARTNERSHIP, 1, 2, 3.

DOCUMENTS.

See INSUFFICIENT ANSWER.

DOMICIL.

See LEGITIMACY.

EASEMENT.

Where the defendant agreed to grant to the plaintiff the right to use certain roads and ways (delineated on the plan) in and through his estate, the Court restrained the defendant from continuing a wall at the extremity of his estate which obstructed the plaintiff from passing through the roads into the land of other landowners. *Phillips* v. *Treeby.* 632

See MINES.

EQUITY TO SETTLEMENT.

See WIFE'S EQUITY TO SETTLEMENT, 1, 2.

ERROR.

See MISDESCRIPTION.

ESTATE.

See DEBTOR TO ESTATE.

EVIDENCE.

See ADVANCEMENT.
LIFE (LEGAL).
VOLUNTARY DEED, 1.

EXAMINATION.

Motion that a former solicitor of the plaintiff, who had declined on the ground of privilege to answer to whom he had applied on behalf of the plaintiff, might attend at his own expense before the examiner and answer the questions, refused with costs. *Marriott* v. *The Anchor Reversionary Company (Limited).* 304

EXCEPTIONS.

See INSUFFICIENT ANSWER.

EXPENDITURE.

A tenant having entered into possession of a farm, and expended moneys under an agreement that the landlord would grant a lease for twenty-one years, and make such improvements and repairs as he and the landlord should jointly agree—*Held* on demurrer that the stipulation as to repairs was not of the essence of the agreement, and that the impossibility of the strict performance of that stipulation, in consequence of the death of the landlord was no sufficient reason for allowing a demurrer to a bill for specific performance where the plaintiff had

so long a possession, and had expended money on faith of the agreement. *Norris* v. *Jackson.* 396

See PARTNERSHIP, 3.
SOLICITOR AND CLIENT, 2.

EXECUTOR.

See COSTS OF SUIT.
DEBTOR TO ESTATE.
LIABILITY OF EXECUTOR.

EXONERATION.

A direction by the testator to his executors to pay all his just debts is, on the true consideration of the statute 17 & 18 Vic. c. 113, sufficient to entitle his executor, who was also the devisee of an estate in mortgage to exoneration. *Smith* v, *Smith.* 263

FEME SOLE.

See FORECLOSURE.
SETTLEMENT.

FINE.

See PENALTY.

FORECLOSURE.

1. In a foreclosure suit against a husband and wife, the agreement for the mortgage having been entered into by the wife when a *feme sole*, and part of the monies paid to her; but the mortgage executed by both husband and wife, the Court made a decree against both. *Lewis* v. *Poole.* 636

2. In a suit for foreclosure or sale, the surviving trustee and executrix of the mortgagor, being also tenant for life of the mortgage property, sufficiently represents the persons interested in the remainder. *Marriott* v. *Kirkham.* 536

FORFEITURE.

On a bill by a tenant for relief who had allowed judgment in ejectment to go by default, the Court relieved against the judgment, on payment by the plaintiff of the taxed costs at law, the arrears of rent, the amount due for repairs and insurance, and 50*l.* costs in equity, and ordered the defendant to account for the rent. *Hill* v. *Barclay*, 18 Ves. 56, observed on. *Bamford* v. *Creasy.* 675

GIFT.

See VOLUNTARY DEED, 1.
WILL, *passim.*

GOODWILL.

See PARTNERSHIP.
MANAGER.

GRANDCHILDREN.

See WILL, 5.

GUARANTEE.

A policy granted to guarantee the honesty of a tax-collector stated to be based on a declaration signed by the collector, which consisted of answers made *bonâ fide* in part incorrect, but substantially correct, to questions proposed by the society, and signed by the applicant and by the overseers; but not by the commissioners of taxes, the real employers. *Held* valid. Distinction between a mere declaration and a warranty. *Anderson* v. *Fitzgerald*, 4 H. of L. C. 484, observed on. *Towle* v. *The National Guardian Assurance Society.* 42

HEIR AT LAW,

See TRUST ESTATES.
VOLUNTARY DEED, 1, 2.

HOUSE.

See CHAPEL.

HUSBAND AND WIFE.

See FORECLOSURE, 1.
JOINT TENANTCY.
SETTLEMENT.
WIFE'S EQUITY TO SETTLEMENT, 1, 2.

INCAPACITY.

See LAND TAKEN BY RAILWAY COMPANY, 1.
MISTAKE.

INCHOATE CONTRACT.

See LIABILITY OF EXECUTOR, 2.

INCORPORATION.

See SHAREHOLDER.

INCUMBRANCE.

See MORTGAGE.

INDEMNITY.

Where one insurance company A., transferred all its business, property, effects, and liabilities to another company, B., on the terms of A. shareholders being indemnified, on a bill by A. for specific performance of the agreement, the Court decreed such indemnity; and the other company, which was ordered to be wound up, having by its official manager filed a cross bill alleging fraud and misrepresentation, and that such agreement was *ultra vires*, the second company, B., having had the benefit of the agreement, was held not to be entitled to object that the agreement was *ultra vires* and improperly entered into by the managing body, and the cross bill was dismissed. *The Anglo-Australian Life Assurance Company* v. *The British Provident Life and Fire Society. The Official Manager of the British Provident Society* v. *The Anglo-Australian Life Assurance Society.* 521

INDENTURES.

See APPRENTICE.

INJUNCTION,

See MISTAKE.
PARTNERSHIP, 2.
PENSION.
PENSION, ASSIGNMENT OF.
SHAREHOLDER.

INSOLVENT.

See ACT OF BANKRUPTCY.

INSOLVENT ESTATE.

See LIABILITY OF EXECUTOR, 1.

INSUFFICIENT ANSWER.

Exceptions to answer, in which the defendant alleged as a reason for not answering fully that part of the interrogatories were unsupported by corresponding statements in the bill, and were copied from interrogatories in an action at law which the defendant had answered, and to which he craved leave to refer—Allowed with costs.

Instead of answering as to documents, the defendant alleged that he was ready to make a full and complete answer on a summons at chambers, to which the plaintiff excepted. Exceptions allowed with costs. *Hudson* v. *Grenfell.* 388

INSURANCE.

Where the lessee of a factory, under a covenant with his lessor to keep the premises insured in the Alliance, or such other office as the lessors should appoint, executed an underlease to the plaintiffs, whereby

the plaintiffs covenanted to pay any sum or sums of money expended in fire insurance; and, in the erroneous belief that the premises (which were empty) were used for a hazardous trade, paid 26*l.* 5*s.* per cent. for insurance in another office, and sought to recover the amount at law against the under-lessee, the Court restrained the action upon the plaintiffs undertaking to pay the amount of premium which was found to be properly payable, and made the defendant pay the costs of the suit. *The Leather Cloth Company* v. *Bressey.* 474

See FORFEITURE.
GUARANTEE.
REPRESENTATION.

INSURANCE COMPANY.

See DEPOSIT NOTE.

INTEREST.

See MORTGAGE.
SETTLED ESTATES ACTS.
SIMONY.
WILL, 4.

INTERPLEADER.

See BILL, IMPROPER.

INTERROGATORY.

See INSUFFICIENT ANSWER.

INVESTMENT.

See LAND TAKEN BY RAILWAY COMPANY, 2.

ISSUE.

See WILL, 8.

JOINT TENANCY.

Bequest of a fund to trustees to pay the interest as M. A. should appoint, and, in default of appointment, to her separate use for life, remainder to her husband and children; and in case she should have no child who should live to take a vested interest, then on trust to assign and transfer the securities unto such person as should happen to be testator's next of kin according to the Statute of Distribution.—*Held*, that the next of kin at the death of the tenant for life took as joint tenants. *Re the Trustee Relief Acts. Re Charles Greenwood's Will.* 390

JUDGMENT.

See FORFEITURE.
LIABILITY OF EXECUTOR, 3.
USURY.

JURISDICTION.

See SETTLED ESTATES ACT.

LANDOWNER.

See MISTAKE.

LAND TAKEN BY A RAILWAY COMPANY.

1. Where a railway company took certain real property vested in trustees for a married woman and her children, and paid the money into court, the Court declined, under the 69th and 78th sections of the Land Clauses Consolidation Act, to direct the fund be paid to the trustees. *In Re M. N. Horwood's Estate; The Victoria Railway Station and Pimlico Railway Act* 1858; *Caroline Greene and her Children.* 218

2. A railway company, having taken certain settled hereditaments and paid the purchase-money into Court, ordered to pay the costs of an intended investment, of which the Master approved, but which was afterwards abandoned. *Re the North Staffordshire Railway Company and the Land Clauses Consolidation Acts. Ex parte Vaudrey's Trusts.* 224

LEASE.

Where it was necessary to grant a large number of building leases of charity lands in nearly the same form under the provisions of an Act of Parliament and one lease, had been settled in chambers, the Court allowed the charity to grant other building leases from time to time in the same form without reference to chambers, the model lease being appended to the order. *The Attorney-General* v. *Christ Church, Oxford.* 514

See CHAPEL.
PARTNERSHIP, 3.

LEGACY.

See SET-OFF.
WILL, 1, 2, 9, 11.

LEGATEE.

See WILL, 1, 2, 9, 11.

LEGITIMACY.

Under a bequest to the children of L. S., who had three children born to him in England while domiciled there, by a woman with whom he cohabited, and with whom he removed to Holland, and while domiciled in Holland had another child born to him by the same woman, whom he afterwards married in Holland.—*Held*, that the law of the country of the domicile at the time of the birth and of the marriage must prevail, and that the child born in Holland was entitled to share equally with another child born there after the marriage, but the three children born in England being illegitimate according to the law of England were excluded. *Goodman* v. *Goodman.* 643

LIABILITY OF EXECUTOR.

1. A promissory note given to a creditor by one of the executors in the name of the testator's firm, while the executor was carrying on the business pursuant to directions in the will, but was ignorant that the estate was insolvent—*Held* personally binding on the executors. *Lucas* v. *Williams.* 150

2. An executor, by the testator's direction, having negotiated for the purchase of a site for schools in connexion with a new church to which the testator had largely contributed, but there being no binding contract at the death, subsequently completed and took a conveyance to himself.—*Held*, not entitled to charge the purchase-money against the estate. *Inskip's Case* (2). 359

3. Where a judgment has been recovered against executors for a debt due from their testator, and they paid the debt, the executors are entitled to be allowed such payment although the Statute of Limitations might have been set up against the creditor who recovered the judgment. *Hunter* v. *Baxter*; *Re W. Freer's Estate.* 214

See DEBTOR TO ESTATE.
EXONERATION.

LIFE (LEGAL).

Evidence of the performance of any vital act, such as the beating of the heart, is enough to constitute legal proof that a child was born alive. *Brock* v. *Kellock.* 58

LIGHT.

See ANCIENT LIGHTS.

LOAN.

See BANKRUPTCY.
RAILWAY COMPANY.
SOLICITOR AND CLIENT, 1.

MAJORITY.

See CHAPEL.

MANAGER.

Where a testatrix directed her executors to continue the business of a public house, and to employ W. as manager at a salary, and at the expiration of the lease the goodwill, &c. &c., to be sold, the Court refused to accelerate the sale at the instance of the residuary legatee, a sale not being required for payment of debts. *Saunders* v. *Rotherham.* 556

MARRIAGE, INVALID.

See LEGITIMACY.
WILL, 4.

MARRIED WOMAN.

See LAND TAKEN BY RAILWAY COMPANY, 1.

MEDICAL EVIDENCE.

See LIFE, LEGAL.

MILITARY PENSION.

See PENSION.
ASSIGNMENT OF PENSION.

MINERALS.

See SETTLED ESTATES ACTS, 1.
MINES.

MINES.

The owners of contiguous estates, who were tenants in common of the mines beneath, held equally entitled to the landing rent paid on foreign coal raised through a shaft which had been constructed by a lessee of the mines, but which opened into the separate estate of one of the owners. *Clegg* v. *Clegg.* 322

See PARTNERSHIP, 3.

MINISTER.

See CHAPEL.

MISAPPLICATION.

See BREACH OF TRUST.

MISDESCRIPTION.

A lot sold by auction, described in the particulars of sale as a mansion-house and pleasure grounds, containing an area of 7683 square feet, or thereabouts, contained in fact but 4350 square feet; but one of the conditions being, "that the admeasurements are presumed to be correct, but if any error be discovered therein no allowance shall be made or required either way. On a bill by the purchaser seeking specific performance with compensation, the Court decreed specific performance without compensation, and ordered the plaintiff to pay the costs of the suit. *Cordingley* v. *Cheesebrough.* 496

MISTAKE.

A railway company, under the misapprehension that a tenant for life was owner in fee of certain land, entered into an agreement with his supposed agent under the 84th section of the Land Clauses Consolidation Act, and took possession of the land, on which they constructed their railway. On a bill by the remaindermen and mortgagees the Court granted an injunction to restrain the company from retaining possession of the land. *Semble* the 68th section of the Lands Clauses Act does not apply to cases where a Company have, under a mistake, wrongfully taken possession of the land. *Deere* v. *Guest*, 1 M. & G. 516, considered. *Perks* v. *The Wycombe Railway Company.* 662

MODEL LEASE.

See LEASE.

MONEYS.

See ACCOUNT.

MORTGAGE.

The word "charge" contaeind in

the 42d section of the 3 & 4 Wm. 4, c. 27, used in connection with the 40th section, includes mortgages: *Dearman* v. *Wyche*, 9 Sim. 370, and *Du Vigier* v. *Lee*, 2 Hare, 326, considered.

An acknowledgment by the devisee of a mortgagor fifteen years after the date of the deed *held* sufficient to entitle the mortgagee as against a second mortgagee and subsequent incumbrances, to recover the arrears of interest for more than six years. *Bolding* v. *Lane*. 561

See CHAPEL.
FORECLOSURE, 1, 2.
PRESSURE.
REPRESENTATION.
TRUST ESTATES.

MORTGAGEES.

See MISTAKE.

MORTMAIN.

See WILL, 1, 10.
WILL AND CODICIL.

MOTION TO COMMIT.

See CONTEMPT.

MUTUAL ASSOCIATION.

See PENALTY.
REPRESENTATION.

NEXT OF KIN.

See WILL, 13.
SETTLEMENT.

NOTE.

See DEPOSIT NOTE.

NOTICE.

Notice of the assignment of a reversionary interest given to the solicitor of the trustees, *held*, notice to the trustees, so as to take it out of the order and disposition of the assign on his insolvency. *Rickards* v. *Gledstanes*. 298

See PLEADING.

NUISANCE.

Where a defendant had contracted to supply large quantities of bricks for fortifications, and having obtained a lease of a great extent of land containing brick clay, erected there numerous brick-kilns, within 340 yards of the plaintiff's mansion, and close to her boundary, the Court restrained the nuisance, there being nothing to show that the defendant might not have burnt the bricks elsewhere, so as not to be a nuisance. *Hole* v. *Barlow*, 4 C. B. N. S. 334, observed on; *Beardmore* v. *Tredwell*. 683

OBLITERATION.

See WILL, 9.

OBSTRUCTION.

See EASEMENT.

OFFICER.

See PENSION.

OFFICIAL MANAGER.

See CONTRIBUTORY.
INDEMNITY.

ORDER AND DISPOSITION.

See NOTICE.

PAROL AGREEMENT.

Possession and expenditure on the faith of a parol agreement to grant a lease of a farm held sufficient to entitle the tenant to a lease although the agreement was denied by the defendant. *Farrall* v. *Davenport*. 363

See SOLICITOR AND CLIENT, 2.

PARTNERSHIP.

Where on the dissolution of a partnership one of the partners is entitled to a return of a proportion of the premium on the ground of failure of the consideration, the

Court in determining the proportion will not always fix it by reference exclusively to the whole period for which it was agreed that the partnership should last, but will have regard to the conduct of the partners and the amount of benefit already obtained. *Bullock* v. *Crockett.* 507

2. Where two partners, each carrying on the partnership in separate districts, agreed to dissolve, and that the partnership premises, stock, and goodwill should be sold, and until sold should vest in receivers, the Court restrained one partner, who had made use of the partnership property, from carrying on the business on his own account in one district, and directed him to account for the profits. *Turner* v. *Major.* 442

3. Lessee of coal mines who had long worked on his own sole account, and continued so to work some only of the demised seams of coal, and during the lease admitted a partner in working another of the seams and afterwards dissolved the partnership.—*Held*, that the partner's interest in the lease was put an end to by the dissolution.

A lease acquired for the purposes of a partnership, whether in the name of one or all of the partners, and dedicated to the partnership purposes, forms part of the partnership assets, but where the owner of a lease admits another to be his partner in the use of a part only of the demised property, and afterwards dissolves the partnership, the partner had no longer any interest in the lease. But the expelled partner was held to be entitled to an allowance in respect of any benefit that had accrued to the lessee in respect of the expenditure of partnership capital. *Burdon* v. *Barkus.* 412

See CONTEMPT.
WIFE'S EQUITY TO SETTLEMENT, 2.

PAYMENT.

See SOLICITOR AND CLIENT, 1.

PAYMENT OF DEBTS.

See MANAGER.

PAYMENT INTO COURT.

See LAND TAKEN BY RAILWAY COMPANY, 1, 2.

PENALTY.

Where the rules of a company provided that any member who should directly or indirectly engage in any merchant's or broker's work which was charged to the company, or if it were offered him by the principal or servants, should be fined 50*l.* for such work so taken, and that no member should leave without giving the agent six months' notice. The plaintiff, who was a member, gave notice on the 27th of June, 1859, that he would leave on the 30th June, but before that day, entered into an engagement with a merchant, and within six months entered into other agreements.—*Held*, that the plaintiff was liable to be fined for the engagement made prior to the 30th of June, 1859, but not for those made subsequently. *Brancker* v. *Roberts.* 276

PENALTIES.

See BUILDING CONTRACT.

PENSION.

The statute of the 47 Geo. 3, sess. 2, c. 25, making void the assignment of military pensions, does not apply to a pension granted by the late East India Company. *Heald* v. *Hay.* 467

PENSION (ASSIGNMENT OF).

An assignment by a retired mili-

tary officer of his pension for valuable consideration is void under the 47 Geo. 3, c. 25, and the Court refused an injunction to restrain the officer from applying for or receiving the pension. *Lloyd* v. *Cheetham.* 171

PER CAPITA.

See WILL, 7.

PLEA.

Plea of an order allowing a demurrer to a former bill by the same plaintiff against the same defendant for the same relief, but there was no averment in the plea that the allegations in the bill pleaded to were the same as in the former bill. Plea over-ruled. *The Marchioness of Londonderry* v. *Baker.* 128

See PLEADING.

PLEADING.

The defence of purchaser for valuable consideration without notice must be stated distinctly in the pleadings, else it cannot prevail. Therefore, where it was not claimed as a ground of defence in an answer or plea, but only in an affidavit on a motion for a decree, it was not allowed. *Phillips* v. *Phillips.* 200

POLICY OF ASSURANCE.

Trustees of a settlement of a policy of assurance being without funds to pay the premiums, assigned the policy to a creditor, and afterwards assigned the trust property to new trustees appointed in their room, but the policy of assurance was not mentioned in the assignment to the new trustees.—*Held*, that the new trustees were not entitled to recover the policy as against the creditor. *Johnson* v. *Swire.* 194

See GUARANTEE.
POWER.

POWER.

By a marriage settlement a policy and monies thereby assured were assigned to four trustees on the trust of the settlement, with power to the husband and wife, on and after the death of the survivor or the continuing trustees, or in case there should be no continuing trustee for the retiring trustee in case the trustees should die or desire to be discharged, to appoint new trustees, and that the estate should be thereon assigned so as to vest in such trustee jointly with the former trustees, and in case there should be no former continuing trustee, then in such new trustee or trustees only. Two of the trustees being dead, and two desirous of retiring, three new trustees were appointed, of whom one being afterwards desirous of retiring, a new trustee was appointed.—*Held*, a valid exercise of the power. *Emmett* v. *Clark.* 32

See TRUST.
VOLUNTARY DEED, 1, 2.
WILL, 2.

POWER COUPLED WITH TRUST.

See TRUST.

PRECATORY TRUST.

See MANAGER.

PREMIUMS.

See POLICY OF ASSURANCE.

PREMIUM, RETURN OF.

See PARTNERSHIP, 1.

PRESSURE.

A deed purporting to be an absolute sale executed by the plaintiff when in great pecuniary difficulties

for an inadequate consideration declared to be only a mortgage for the amount of the purchase-money, it appearing that the plaintiff's object within the knowledge of the defendant was to obtain a loan and not to sell, that one solicitor alone acted for both parties, and that the defendant, the purchaser, had been suddenly introduced instead of an intended lender, on the day the transaction was completed, the defendant was ordered to pay the costs of the suit; but, the plaintiff having disputed the authentieity of the documents which were proved in the cause, the Court disallowed him the costs occasioned by the imputation that the documents were forged. *Douglas* v. *Culverwell.* 251

PRESUMPTIVE SHARE.

See WILL, 7, 8.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGE.

See EXAMINATION.

PROMISSORY NOTE.

See LIABILITY OF EXECUTOR, 1.

PROMOTERS.

See SHAREHOLDER.

PROPERTY RECOVERED.

See SOLICITOR AND CLIENT, 4.

PROVISIONAL DIRECTOR.

See CONTRIBUTORY.

PUBLIC HOUSE.

See MANAGER.

PURCHASE.

See LIABILITY OF EXECUTOR, 2.

QUANTITIES.

See MISDESCRIPTION.

RAILWAY COMPANY.

Bill against the directors of a railway company which had power to borrow monies not exceeding 45,000*l.* "on mortgage or bond," so soon as the whole capital had been subscribed and one-half paid up, alleging that monies had been illegally borrowed, and praying for a declaration that such borrowing was illegal, and to restrain the defendants from repaying the monies out of the company's assets. Demurrer allowed on the ground that there was no allegation that one-half of the subscribed sum had not been paid up, or that the defendants intended to issue bonds or mortgages before it was due. *Nowell* v. *The Andover and Redbridge Railway Company.* 112

See COMMON CARRIERS.
LAND TAKEN BY RAILWAY COMPANY, 1, 2.
MISTAKE.

REAL ESTATE.

See WILL AND CODICIL.

RECEIVER.

See CONTEMPT.
PARTNERSHIP, 2.

REFEREE (DEATH OF).

See EXPENDITURE.

REGISTRATION.

See SHAREHOLDER.

RELIEF.
See FORFEITURE.
PENALTY.
BUILDING CONTRACT.
SECURITY FOR COSTS.

REMAINDERMEN.
See FORECLOSURE, 2.
MISTAKE.

REPAIRS.
See FORFEITURE.

REPRESENTATION.

The plaintiff insured his ship by becoming a member of an association for marine assurance, and signed an undertaking to be bound by the rules of the association; but, although he applied for a copy of the rules, he was not furnished with one; and although he mentioned that his ship was mortgaged, he was not told that there was a rule that no member should recover any money on his insurance whose ship was mortgaged, unless the mortgagee had previously to the loss covenanted by deed to pay all sums which might become due from the mortgagor to the association. Demurrer to the bill filed alleging the loss, and to recover the sum insured on the ground that the mortgagee had not executed such a deed, overruled. *Turnbull* v. *Woolfe*. 91

See FORECLOSURE, 2.
GUARANTEE.
WILL, 11.

RESIDENCE ABROAD.
See SECURITY FOR COSTS.

RESIDUARY LEGATEE.
See MANAGER.

RESIDUE.
See WILL, 6, 10.

REVERSIONARY INTEREST.
See NOTICE.

REVOCABLE INSTRUMENT.
See WILL, 11.

REVOCATION.
See VOLUNTARY DEED, 1.
WILL, 11.

RIGHT TO SUE.
See SHAREHOLDER.

RIGHT OF WAY.
See EASEMENT.

ROAD.
See EASEMENT.

SALE.
See MANAGER.
PRESSURE.
SETTLED ESTATES ACT, 1, 2.
WILL AND CODICIL,

SCHOOLS.
See LIABILITY OF EXECUTOR, 2.

SCREEN.
See ANCIENT LIGHTS.

SECURITY.

Demurrer to a bill stating that the plaintiff had deposited moneys as security against a disputed claim on trust, that if the claimant should within one month bring and diligently prosecute an action then to satisfy the amount recovered, otherwise on trust for the plaintiff, and stating that the claimant had brought the action and obtained a nominal verdict with leave to the defendant to move to set aside the verdict, and which was afterwards turned into a special case not yet determined, and asking for return of deposit,—Overruled. *King of Portugal* v. *Russell*. 287

SECURITY FOR COSTS.

A plaintiff resident abroad is not compelled to give security for costs where the bill is filed by way of defence to an action at law, although it seeks other relief. *Williamson* v. *Lewis.* 394

SERVICES.

See WILL, 11.

SETTLED ESTATES ACTS.

1. Under the Settled Estate Act, 19 & 20 Vic. c. 120, the Court has jurisdiction to direct the sale of minerals beneath the surface separately from the land. *Re Mallin's Settled Estates.* 126

2. In determining what, under the Settled Estates Acts, is a settled estate, the Court will refer to the state of circumstances at the date of the instrument, not to the circumstances at the time when it came into operation.

Interests arising "by accruer" under trusts to which property stands limited are within the meaning of the word "succession."

Where parties entitled absolutely to some of the shares joined as petitioners the Court decreed the whole estate to be sold. *Re Goodwin's Settled Estates.* 620

SETTLEMENT.

A married woman under a general power of appointment, exerciseable during coverture by deed of appointment executed after marriage, appointed the property to trustees on trust during the joint lives of herself and her husband, for her sole and separate use; and if she should survive her husband, on trust for herself absolutely; but in case she predeceased him, as she should appoint; and in default of appointment, to her next of kin. There were no children, and the marriage having been dissolved by a final decree of dissolution, on account of the husband's misconduct—*Held*, that the wife was absolutely entitled. *Jessop* v. *Blake.* 639

SETTLEMENT.

See POWER.
WIFE'S EQUITY TO SETTLEMENT, 1, 2.

SET-OFF.

A testator who had advanced monies to his son, and paid large sums on his account, bequeathed to him a legacy without making mention of the debt.—*Held* that the loan and unascertained balance must be set off against the legacy.

Upon the same principle the Court held that the assignees of a firm indebted to the testator were not rendered entitled to receive a legacy bequeathed by the testator to a member of the firm.

Cherry v. *Boultbee*, 4 M. & C. 442, considered.

But a legacy to the *cestui que trust* of a settlement by which the testator had covenanted with trustees to settle certain funds—*Held* not a satisfaction of the covenant. *Smith* v. *Smith.* 263

See DEPOSIT NOTE.

SHAFT.

See MINES.

SHARE.

See WILL, 3, 6, 7, 8, 10.
WILL AND CODICIL.

SHAREHOLDER.

A registered shareholder in a railway company, which was afterwards incorporated with a new company by an Act of Parliament, enacting that every registered shareholder in the old company should be deemed to

hold a share in the new company, to be called a deferred share, and entitled on demand to receive a certificate for such deferred share.—*Held* entitled to sue in respect of the funds of the new company, although he had not exchanged his shares, or received a certificate as a shareholder in the new company.

Where the promoters of the new undertaking signed the subscription contract for sums which they represented to Parliament as out of their own funds, but which in fact they borrowed, and afterwards sought to charge against the funds of the new company, the Court, at the instance of the plaintiff, a shareholder of the old company, restrained by injunction such application of the funds. *Spackman* v. *Lattimore.* 16

SHERIFF.

See CONTEMPT.

SHIP.

See REPRESENTATION,

SIMONY.

An agreement for the sale of an advowson, containing a stipulation that the vendor should pay interest until the benefice became vacant (the incumbent being a son of the vendor, but not a party to the contract—*Held* not simoniacal. *Sweet* v. *Meredith.* 610

SOLICITOR AND CLIENT.

1. Claim by a solicitor against a testator's (his client's) estate for a sum of money advanced to the client on loan, but which in fact formed the proceeds of a bond debt due to the testator and received by the solicitor at the client's direction, and which the solicitor alleged the client had given him by an agreement prepared by such solicitor at the client's expense, and containing no recital of intended bounty,—Disallowed. *Re Holmes's Estate. Woodward* v. *Humpage. Beavan's case.* 337

2. The solicitor to the tenants for life, with power of leasing settled real estate, who had obtained from his clients a parol agreement for a lease, on faith of which he expended large sums—*Held* not entitled to a lease.

Specific performance of a parol agreement by tenants for life with power of leasing not decreed on the ground of possession and expenditure if prejudicial to remainderman. *Shannon* v. *Bradstreet,* 1 Sch. & L., 52, and *Blore* v. *Sutton,* 3 Mer. 237, illustrated. *Trotman* v. *Flesher. Flesher* v. *Trotman.* 1

3. Under the 28th section of the 23 & 24 Vic. c. 127, the town agent held entitled to a charge on all property recovered in three suits for an unascertained balance due to him by the country solicitor. *Tardrew* v. *Howell.* 381

4. Charge in a solicitor's bill apparently excessive, and alleged to be overcharged — *Held* special circumstances, under the 6 & 7 Vic. c. 73, sufficient to authorise the Court, under the 6 & 7 Vic. c. 73, s. 37, to direct the bills to be taxed more than twelve months after delivery, although one item complained of was sworn to be a mistake. *Re St. Pierre B. Hook, solicitor. Re 6 & 7 Vic. c. 73.* 372

See ACCOUNT.
EXAMINATION.

SPECIAL CASE.

See SECURITY.

SPECIAL CIRCUMSTANCES.

See SOLICITOR AND CLIENT, 4.

SPECIFIC LEGATEES.

See WILL, 10.

SPECIFIC PERFORMANCE.

See EXPENDITURE.
INDEMNITY.
MISDESCRIPTION.
PAROL AGREEMENT.
SOLICITOR AND CLIENT, 2.

STATUTES.

27 ELIZ. c. 4 . . . 166
21 JAC. 1, c. 16 . . . 214
22 & 23 CAR. 2, c. 10 . . 390
29 CAR. 2, c. 3 . . 1, 363
1 ANNE, c. 148
9 GEO. 2, c. 36. . . 182, 308
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33 GEO. 3, c. 55 . . . 191
47 GEO. 3, s. 2, c. 25 . . 171
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3 & 4 WM. 4, c. 27 . . 561
1 & 2 VICT. c. 110 . . 301
5 VIC. c. 7 191
6 & 7 VIC. c. 73. . . 372
8 & 9 VIC. c. 18 . . . 225
12 & 13 VIC. c. 106 . 100, 108
13 & 14 VIC. c. 60 . . 465
15 & 16 VIC. c. 76, . . 679
17 & 18 VIC. c. 31 . . 650
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19 & 20 VIC. c. 120 . 126, 625
21 & 22 VIC. c. 77 . . 626
23 & 24 VIC. c. 35 . . 679

STATUTE OF DISTRIBUTIONS.

See JOINT TENANCY.

STATUTE OF FRAUDS.

See PAROL AGREEMENT.

STATUTE OF LIMITATIONS.

See LIABILITY OF EXECUTOR, 3.
MORTGAGE.

STATUTE OF MORTMAIN.

See WILL, 1, 10.
WILL & CODICIL.

STATUTE OF SETTLED ESTATES.

See SETTLED ESTATES ACTS.

SUBSCRIPTION.

See CONTRIBUTORY.
RAILWAY COMPANY.

SUCCESSION.

See SETTLED ESTATES ACTS.

SURETY.

A surety who executes a bond on a misrepresentation by the obligee of a material fact is entitled to relief in this Court; therefore, where the plaintiff was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, the Court directed the bond to be cancelled.

Where the bond by a surety purported to guarantee the payment of flour to be supplied by the obligee (of a specified quantity) in order to enable the principal debtor to execute a contract, and the obligee designedly supplied inferior flour, so that the contract was annulled, the obligor is entitled to have the bond cancelled. *Blest* v. *Brown.* 450

SURVIVORSHIP.

See JOINT TENANCY.

TENANT FOR LIFE.

See MISTAKE.

TENANTS IN COMMON.

See WILL, 3.

THREAT.

See BILL, IMPROPER.

TRADE CHATTELS.

See ACT OF BANKRUPTCY.

TRADER.

See BANKRUPTCY.

TRANSMISSIBLE INTEREST.

See WILL, 6.

TRUST.

A trust to raise by sale of a competent part of a sum of 3389*l.* Bank Annuities, a sum not exceeding 2000*l.*, and pay the same to the plaintiff.—*Held*, not to be exhausted or fully performed by raising a sum of 1391*l.* at the plaintiff's request. *Harrold* v. *Harrold.* 192

See ACCOUNT.
BREACH OF TRUST.
CHAPEL.
LAND TAKEN BY RAILWAY COMPANY, 1, 2.
POLICY OF ASSURANCE.

TRUST ESTATES.

A devise by a testator of all his real and personal estate to his nephews, and nieces who were a numerous and unascertained class —*Held* not to pass estates vested in the testator in trust or on mortgage, but that such estates descended to his heir at law. *Re the Trustees Act*, 1850. *Re Finney's Estate.* 465

TRUSTEE.

See FORECLOSURE, 2.
POWER.

TRUSTEES.

See BREACH OF TRUST.

USURY.

Judgment entered up in 1852 on a warrant of attorney of the same date, bearing an indorsement that the said warrant was given to secure 4500*l.* with interest at ten per cent., provided that any equitable charge which the creditor might have on the lands of the debtor by registering the judgment should not be relinquished by taking the debtor into execution.—*Held*, that the judgment was not void on the grounds of usury. *Boughton* v. *Jarvis.* 144

VALUABLE CONSIDERATION WITHOUT NOTICE.

See PLEADING.

VESTING.

See POWER.
TRUST ESTATES.
WILL, 6.

VITALITY.

See LIFE, LEGAL.

VOLUNTARY DEED.

1. A voluntary deed whereby an aged and infirm, though not incapable donor made an immediate gift of her whole property without power of revocation, and without sufficient evidence that she fully understood the effects of the instrument, set aside after her death at the instance of the heir at law. *Anderson* v. *Elsworth.* 154

2. Where, in a voluntary deed containing a clear declaration of trust of real estate, and professing to operate by appointment to trustees in exercise of a power, the limitation and conveyance were to the trustees, their executors, administrators, and assigns, omitting the word "heirs," the Court held that the real estate was impressed with the

trust, and declared the heir at law of the settlor a trustee for the *cestui que trust*. *Dilrow* v. *Bone*. 538

WARRANT OF ATTORNEY.

See USURY.

WARRANTY.

See GUARANTEE.

WAY-LEAVE.

See MINES.

WIDOWHOOD.

See WILL, 3.

WIFE'S EQUITY TO SETTLEMENT.

1. Where a husband is unable to maintain his wife, and the fund is small, the Court will order the whole to be settled; but in a case where the husband was in good circumstances the Court directed one-half the fund to be settled on the wife. *Re Grove's Trusts*. 575

2. In giving effect to a wife's equity to a settlement the proportion which the Court will settle is discretionary. Therefore, where the husband was partner in a firm which, on its bankruptcy, was indebted to the testator in an amount greatly exceeding 13,000*l*., no settlement having been made on the marriage, and the wife and children being unprovided for, but not deserted, the Court ordered the whole fund, amounting to 13,000*l*., to be settled on the wife and children. *Smith* v. *Smith*. 121

WILL.

1. Bequest of 200*l*. to aid of deaf and dumb to found a chapel for them in London—*Held* void under the Statute of Mortmain. *Hopkins* v. *Phillips*. 182

2. Devise to trustees of freehold premises on trust to pay the rents to P. for life, and after her decease on further trust for such person or persons, being a child or children of P., as she should by will appoint; and in case P. die without leaving children her surviving, or in default of appointment, or so far as such may not extend, on trust for M. in fee. P. died leaving children, but without appointing.—*Held*, M. entitled. *Goldring* v. *Inwood*. 139

3. A devise of real estate to trustees to pay the rents and profits to C. for life, during widowhood, and after her decease or second marriage "to pay the rents and profits to all and every the child and children of his late sister, until the youngest of them should have attained twenty-one; and when and so soon as the youngest should have attained twenty-one, then on trust to sell the real estate, and to divide the monies equally between and among the said children, share and share alike.—*Held*, that all the children were tenants in common until the youngest attained twenty-one. *Re Grove's Trusts*. 575

4. Gift by a testator of 3000*l*. to a woman with whom he had contracted an invalid marriage, "to be for her sole and separate use during her lifetime, and while she continues unmarried; thereafter, should she marry, the principal sum with accruing interest thereon to pass into the hands of the residuary legatee." —*Held* an absolute gift, subject to a gift over in case of her marrying again. *M'Culloch* v. *M'Culloch*. 606

5. Gift by a testator to the children of his late brother John, and in another clause there was a gift to the issue of his said brother. The brother John had only one son, who died in the testator's lifetime leaving four children.—*Held*, that these four

grandchildren were entitled, there being no children. *Berry* v *Berry*. 134

6. Gift of residue on trust to pay the dividends to the testatrix's son for life (except what was required for education of her son's children), and should her son die before all or any of his children should attain twenty-one she wished each child to receive their share on attaining twenty-one, but should all his children die before himself, at his death. then over—*Held*, that a child who died an infant in the lifetime of the son had not acquired a transmissible interest. *Chadwick* v. *Greenall*. 221

7. Gift by a testator of real and personal estate to trustees on trust for his brothers or sisters for life, with a direction after the decease of the survivor of them to sell and to divide the proceeds unto, and equally between all his nephews and nieces, grandnephews and grandnieces, to take *per capita* with power to apply the presumptive shares for advancement and maintenance.—*Held*, that all the class, including those born after the testator's decease, were entitled *per capita*. *Re The Trustee Relief Act. Re Partington's Trust.* 378

8. Gift by a testator of personal estate to his wife for life, remainder between and among his seven children by name, or such of them who should be living at his wife's decease, and the issue of such as should be dead leaving issue, with power to apply the presumptive share of such issue for maintenance. A son of the testator died after his father's death, leaving an infant daughter who died in the lifetime of the testator's widow.—*Held*, that such infant took a vested share. *Re The Trustees Relief Act. Re Pell's Trust.* 152

9. A legacy given thus, "£1.0.0," which stood between two other legacies for £100 each, the dots between the figures being smeared as if for the purpose of obliteration —*Held* to be a legacy for £100. *Manchee* v. *Kay*. 545

10. A testatrix, having made specific gifts of chattels, gave a small annuity and pecuniary legacies to various persons and to charities, and bequeathed her residuary estate among the persons whose legacies did not exceed £200. —*Held*, that the specific legatees of chattels, and the charities, were not entitled to share in the residue, but that an aged legatee of an annuity of 36*l*. a year, valued at 146*l*., was entitled to a share of the residue. *Nicholson* v. *Patrickson*. 209

11. Where a testator in advanced years and ill health induced his niece to reside with him as his housekeeper on the verbal represent tation that he would leave her certain property by his will, which he accordingly caused to be prepared and executed, but subsequently by a codicil revoked, the Court directed the trusts of the will to be performed.

A gift made by a revocable instrument in pursuance of a verbal representation, whereby the donee is influenced, and on the faith of which she confers a benefit on the donor, becomes irrevocable. Observations on the case of *Jorden* v. *Money*, 5 H. of L. C., 185, as inconsistent with the decision of the House of Lords in *Hammersley* v. *De Biel*, 12 Cl. & F., 45. *Loffus* v. *Maw*. 592

12. Where a testatrix "gave all those her freehold messuages or tenements, hereditaments, and premises called West Cliff, with the appurtenances thereto belonging, situate at West Cowes, and now used as lodging-houses;" and in a codicil referred to the same property as her estate called West Cliff, at

West Cowes — *Held*, sufficient to pass, besides the lodging-houses other houses of which some were unfinished, and also certain plots of ground, together with the site of a private road and of a church then building, and the advowson, all known as the West Cliff Estate. *Cunningham* v. *Butler*. 37

13. Where a testator gave all his personal estate in equal shares to eight societies, of which three, viz. the East London Free School Society, the Anti-Slavery Society, and the African Society, had become extinct before the testator's death, the last before the date of the will, the court declined to order the shares in the fund to be applied *cy-près*, and held the next of kin entitled. *Langford* v. *Gowland*. 617

See EXONERATION.
JOINT TENANCY.
LIABILITY OF EXECUTOR, 2, 3.
SET-OFF.
SOLICITOR AND CLIENT, 1.
TRUST ESTATES.

WILL AND CODICIL.

A testator having bequeathed numerous pecuniary legacies, some of them to charities, gave the residue of his real and personal estate to trustees on trust to sell and thereout to pay his debts and the legacies herein mentioned, and further directed the before-mentioned charitable bequests to be paid, and that the proceeds of such part of his estate as the law did not permit to be given to charities should be first applied in payment, of such of the legacies herein mentioned as were not given to charities, he further directed that no charitable bequests should be legally payable till six months after his decease. By a codicil he gave numerous other charitable legacies, and gave the residue of his property among charitable legatees. — *Held* that the words "herein mentioned," included the legacies given by the will and codicil taken together.

Secondly, *Held*, that, having regard to the distinction made in the will between property capable of being bequeathed for charitable purposes and property not so applicable, the word "property" in the codicil signified such property as was legally applicable to the purpose of the legacies.

Thirdly, that the charitable legacies were not payable on the expiration of six months, but in the ordinary way. *Jauncey* v. *The Attorney-General*. 308

WINDING-UP.

See INDEMNITY.

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